THE READING OF That Famous and Learned Gentleman, Robert Callis Esq; Sergeant at Law, Upon the Statute of 23 *H.* 8. *Cap.* 5. OF SEWERS:

As it was delivered by him at *Grays-Inn*, in August, 1622.

Quod omnes tangit, ab omnibus supportari debet.

LONDON:
Printed for *William Leak*, and are to be sold at his Shop, at the Sign of the Crown in Fleet-street, between the Temple-Gates,
MDCXLVII.

Thom. Tanner.

THE

READING

OF

That Famous and Learned Gentleman,

Robert Callis Esq;

Serjeant at Law,

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BIBLIOTHECA BODLEIANA

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READER,

AMongst other *Decays* in the *Common-wealth*, those of *Bridges, Calceys, Havens* and *Ports* are not of the least Consideration, as the *Gates* that open and let in *Commerce*, and the ways that convey and lead it through the Kingdom: And it seemed to me to be of so *Publique a Necessity*, that I did conceive this *Learned Piece* upon the Laws of Sewers would come seasonably abroad, and finde an *Entertainment* sutable to the usefulness of it at this time, when the *Countrey* is almost become *Unpassable* by the late Troubles; wherein the endeavor was more to be secured at home from them that were abroad, then to Traffique with them. If you can sit down to a *cold* Reading, here is one served out to

you at my coſt; all that I ſhall adde to your Cheer is, That I had publique allowance to make the *Invitation*: If the *Printer* have committed *Infanticidium*, lay the blame upon him; but if he have delivered the preſs of it ſo imperfectly, that it will be only fit to move Pity, and to *Beg* withall, the *misfortune* is mine, and I muſt *Keep* it.

Farewel.

The

The chiefeſt matters in this Book, as they lie diſpoſed in each days work of the Reading.

In the firſt Lecture,

THe Readers grave Speech.
The Cauſes wherefore he read on this Statute.
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The Extent of this Law.
The neceſſary uſe of this Law.
The Diviſion of this Law.
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The Points of the firſt Caſe.
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The Readers Argument upon this Statute and Commiſſion.
The Definition of Iſlands, &c.
What grounds ſhall be ſaid to be left by the Sea.
The Readers Tenets therenpon.
The Shore what.
Sea-Coaſts what.
Creeks what.
Arm of the Sea what.
Diverſity between a Shore, Coaſt and Creek.
Bay, Fleet and Mere, what.
A Port what.
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Diverſity between grounds gained and grounds left.
The Concluſion of the Reader upon his firſt Lecture.

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WHat buſineſſes on Land this Law doth Defend, and what Offences it Reformeth.
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Wall what.
River what.
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A Gutter what.
Ditches, Pools, Ponds, what.
Streams, Conduits, Springs, what.
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Bridges, and proviſion for them.
Calcey what.
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New Defences.
Arguments pro & con for New Defences.
The Kings Councels Order.
What View and Survey is.

What

What may be done by Officers of Sewers by Survey only.
What may be done by Jury.
What may be done by their Discretion.
The several degrees of Discretion.
In what things Commissioners are to be ruled by good Discretion.
Nine several ways for keeping and repairing Defences,
1. Frontage. 2. Ownership. 3. Prescription. 4. Custom. 5. Tenure. 6. Covenant. 7. Vsus rei. 8. Township. 9. This Law of Sewers.
Whether one may be Taxed for Tythes by the Law of Sewers, or not.
Whether a Copyholder for his Copyhold, and a Lord for his Freehold of that Soil, shall be assessed.
Four tenets concerning Copyholders.
What Lands and other things, and what persons, and in what degree they are to be assessed towards Repairs by this Law in this case.
1. High Mountainous grounds by Prescription, Custom and Tenure.
2. Dean and Chapter, &c. for an Annuity.
3. For Common of Piscary in Fens, &c.
4. For a Ferry.
5. For Herbage.
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The large Extent of the word Tenement.
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1. Point, Whether an Office may be Intailed, or not.
2. Whether it be an ordinary Intail or franck-Mariage; and what things incident to franck-Mariage.
3 How a Bastard may inherit Land.
The Sewers a Court of Justice.
How Courts had their beginning.
The Reasons that Sewers are a Court.
Imprisonment by Commissioners of Sewers.
In what case Commissioners may Imprison, Fine and Amerce.
The qualities of a Fine.
Amerciaments what.
A Distress, and the several kinds of it.
In what place a Distress may be taken.
Whose goods may be distrained.
Where property of Goods is alterable without consent.
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Where a Replevin lieth, and where not.
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Sales of Lands.
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What Persons and Estates are bound hereby.
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In the fourth Lecture,

THree Points at the Common Law, and four upon the Statute.
How a competent Commissioner must be qualified; and if not, how punished.
What qualities makes a free Citizen a competent Commissioner.
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Exile described.
Abjuration a legal Exile.
What a man Exiled forfeiteth.
How many ways a Freeman of a City or Borough may be made.
What kindes of Habitation the Freeman should be of.
What be, and what be not valueable Substance.
What Goods will enable one to be a Commissioner, and what not.
What are Hereditaments in this Law.
An inner Barrister is a fit Comissioner.
Whether a Woman may be a competent Commissioner within this Statute.
An Infant above Fourteen, and under Twenty one years, a Commissioner.
Whether Laws and Ordinances made by a disabled Commissioner be void, or not.
Ten Impediments or Annoyances this Statute speaketh of, viz.
1. *Streams.*
2. *Mills.*
4. *Bridges.*
3. *Ponds*
5. *Fishgarths.*
6. *Mildams.*
7. *Locks.*
8. *Hebbingweres.*
9. *Hecks: and*
10. *Floodgates.*
These Impediments and Annoyances discoursed of.
To make a Stream Navigable.
The Readers Conclusion on the fourth Lecture.

In the fifth Lecture,

A Short Speech of the Readers.
A brief Repetition what is handled in the four former Lectures.
Commissioners of Sewers have power to make, confirme and ordaine Laws, Ordinances and Decrees, and

and the same to amend, or make new.
Things considerable in making new Laws and Ordinances.
A Law, Ordinance and Decree, what they are, and their difference.
Laws and Ordinances for sale of Lands, how to be perfected, and in What manner.
Repealing of Laws.
What grounds to be observed in Repealing of Laws.
How far the power of Commissioners extends therein.
The Readers Conclusion of all his Labors.

Lectura

Lectura prima.

MY moſt worthy Fellows and Companions of this noble and renowned Society, the Hour-glaſs of my puiſne time is run, and I am now come to take poſſeſſion of your Readers place; wherein I muſt hazard to your cenſures the fortunes of my inability: Theſe Twenty and ſix years compleat I have had continuance here, and in that time I have only taken the meaſure and length of your Hall: And herein I acknowledge *Graies-Inn* to be the Patron of my beſt fortunes, and your ſelves the beſt Companions of my forepaſt and preſent life. I made a queſtion, when it came to my turn to reade, Whether I ſhould turn therefrom or not, being then troubled about Two things, *Charge* and *Care*, both which I put into a pair of Scales, wherein I thought *Charge* weighed heavy and ſolid (for *ibi ponebantur ſolidi*) *Care* notwithſtanding had his equal weight with the other, and poiſed the Scales even: Yet I conſidered the ſmall Subſtance I had got came by my Profeſſion, I therefore took my ſelf both in Credit and Conſcience bound to undertake this burthenſome place, for the maintenance and preſervation of the honor of this houſe; and with that I put *Charge* and *Care* in one Scale, and *Reſolution* in the other, which ſcaled them both up. Twenty years likewiſe of my laſt paſt time, I have in the practiſe of my Profeſſion ſpent, but, I hope, little conſumed thereof; In which time I lanched forth my Ship (*In profundum maris*) for a Voyage to the Sea, and now ſhe is returned to your Shores, furniſh'd and balliſt with Merchan-

dize of ſeveral eſtimates: By my Ship I mean my Statute which I read on, which be the Laws of Sewers; the Merchandize be the weighty matters therein contained: By the Governors and Rulers of this Ship, I mean the grave and prudent Commiſſioners who are put in charge and truſt with the execution of theſe Laws: By the Mariners, I intend the Officers of this Law; the Merchants place I reſerve unto my ſelf: The Wares brought home be of divers ſorts, ſome only fit for the Imperial Majeſty of a King, and theſe be Royal Prerogatives, ſhewing forth their ſplendor like the *Flower de Lice* in the Crown; others belong to high Nobility, and ſome be uſeful for the homely Commonalty; the reſt which ſhall remain, I have caſt under Hatches for my laſt days Mart, when I mean to make chaffer on them all. But though I ſeem to make theſe Markets of my Legal Merchandize, yet I do not mean to ſet ſuch Rates upon them as Merchants uſe to do, which be all for (*utile dulce*) for I only ſet one price upon all, which is your kinde acceptance. Marvel not, I pray you, at theſe my Sea-like ſalutations, for this day I am become god *Neptunes* Orator, and I mean to diſplay the power of his Empire; for my Statute, my Caſes, and my Argument, will all depend upon the Element of Water, over which, as Poets feign, *Neptune* hath chief predominance. Well, now my Ship is at ſhore, and I have caſt Anchor there, and to my great comfort I ſee many Chapmen attending the Market, and therefore now preſently I will unlock, and ſet open the cloſet of my Store, which be contained in the fair Volumns of the Law, and eſpecially in that Law made and Enacted in the Parliament held in the 23. year of *Hen.* the 8. Chapt. 5. which is *A general Act concerning the Commiſſioners of Sewers for all the Realm of* England.

The cauſes wherefore I made choice to read upon this Law, be five in number; *Viz.*

1. First, For the Antiquity of theſe Laws of Sewers, though this Statute bear date but 23. *Henry* 8.

2. Secondly, For the Largity and extent thereof, which appears

appears in the ſtile of this Statute, and there termed, *A general Act for all the Realm of* England.

Thirdly, For the neceſſary uſe thereof, which continual practiſe and daily experience teacheth us. 3.

Fourthly, I have had a more deſire to read upon theſe Laws, becauſe never any Reader did heretofore undertake the ſame; and upon peruſal of this Statute, and upon due conſideration taken of others, I thought I could not make my choice of a more fitting, and more neceſſary Law, nor more profitable for my Native Countrey of *Lincolnſhire*, and other Maritime places of this Kingdom, then this is. 4.

And Fifthly, His Majeſties general care, which theſe Laws require at His hands, and his ſpecial care, by the which His Highneſs of late hath taken theſe Laws into His gracious and provident protection. 5.

And upon due conſideration taken of all theſe Caſes, I reſolved to proceed in the Expoſition of this Statute, being made perpetual by the Statute of 3. *Edward 6. cap.* 8.

And to ſpeak ſomething of the three firſt cauſes, I am of Opinion for the Reaſons and Authorities enſuing, That the Laws of Sewers have been and be of great Antiquity, and have told over as much time and as many years as any other Laws of this Realm have done: For as Mr. *Cambden* in his *Britannia* ſaith, *Quod inſula Britannia avida in mare omni ex parte ſe projecit*; Therefore this Realm adjoyning on every ſide upon the Sea, could not be ſafe without thoſe provident Laws made and uſed for the defence thereof. Antiquity of theſe Laws. *Cambden.*

And although it is ſaid in Scripture, That Almighty God hath bound the Seas by the word of his Commandment, and had ſhut up the Deep, and ſealed it with his terrible and glorious Name; yet God, who beſtowed wiſedom on man, it was his pleaſure he ſhould providently uſe it over the reſt of the Creatures, not giving way that he ſhould be remiſs or preſumptuous in any thing, which by his foreſight or judgement might be prevented, helped and relieved. In *Manaſſes* Prayer King of *Judah.*

It is true, that at the Flood, *Cum cataractæ Cœli fuerint* Geneſis cap. 7.

aperta, when the windows of Heaven were by Gods determinate will ſet open, and that the Seas did *Suum excedere modum*, no power of mans hand could ſtay the ſwallowing and devouring ſurges of the Seas and Waters; yet then notwithſtanding had God appointed that his Servant *Noah* and his Children, and ſuch Creatures as he appointed, ſhould be preſerved by the Ark, which was a work of their own hands; Therefore the Laws of God and Nature have appointed man to make proviſion for the neceſſary defence and ſafety of himſelf and of his Countrey; And the Laws of this Realm, moſt of which have received their *primam eſſentiam* from the Divine Laws of the Almighty, and have fetched their Pedigree from the Law of Nature, have a *principio bene* ſo predominant in this Kingdom of *England*, that they have never been wanting at any time, to provide for the ſafety thereof.

And if the Regiſter be ſo ancient a Book as Sir *Edward Cook* in one of his Epiſtles hath there declared it to be, then it may give ſatisfaction in this kinde, that theſe Laws of Sewers were in theſe times of great iminency and authority; For there I finde two ſeveral Writs or Commiſſions of that nature, The one authorizing certain perſons to ſurvey the defences in the parts of *Holland* in the County of *Lincoln*, The other for the viewing and ſurveying of the ſurrounded grounds lying between the two Rivers *Humber* and *Auckholin* in the ſaid County of *Lincoln*; And the firſt of the ſaid Commiſſions is ſet down *verbatim* in *Fitz. nat. bre. fo.* 113. Yet the firſt Statute which appears to us in Print, wherein the frame of a Commiſſion of Sewers is ſet down, is the Statute of *6. Henry 6. Chapt.* 5. Yet I make no queſtion but the ſaid Commiſſions expreſſed in the Regiſter, and *Fitz. na. bre.* were in their forms long before *Henry* the *6.* time; and that the Statute of *Hen. 6.* addes ſome more power and ſtrength thereto then was before, having backt them with the power of the Parliament; and it is ſomething additional in matter, as it was in power, as by both the Commiſſions compared together is apparent.

Regiſter in *Oyer and Terminer.*

Fitz. Nat. bre. fol. 113.

6. H. 6. cap. 5.

I do

I do likewiſe finde in the 38. *Edw.* 3. *Lib. Aſſ. plat.* 15. That a Commiſſion was awarded to inquire of Bridges, and of the repairs thereof, which is a branch of theſe Laws: And Sir *Edward Cook* in his 10. *Report* in the Caſe of the Iſle of *Ely*, ſaith, That the Kings of this Realm, before the making of any Statute of Sewers, might grant Commiſſions for the ſurveying and repairing of Walls, Banks and Rivers, and other defences. And of the ſame opinion is the books of Sir *John Davies* in his *Iriſh Reports*, in the Caſe of the Royal Piſchary of the *Banne*. And Sir *Edward Cook* hath in his firſt Caſe ſet the firſt Statute of Sewers to be in time the 9. *H.* 3. which is in *Magna Charta* the firſt volumn of of Statutes, and the moſt ancient that be extant in our Laws.

38. *Ed.* 3. lib. Aſſ. pl. 15.

Sir *John Davies* Reports.

9. *H.* 3.

By all which is manifeſt, that theſe Laws have been received into the government of this Realm, in time as ancient as any other were; And I am the rather herein confirmed, for that in the ancient Commiſſion expreſſed in the Regiſter aforeſaid, there be theſe words, That the King *Ratione dignitatis ſuæ regiæ ad providendum ſalvationi regni ſui circumquaq; fuit aſtrictus*: Wherein it is hereby made plain, That the King by the Tenure and Prerogative of His Crown, was bound to ſee and foreſee the ſafety of this Realm; and ſo this Law is a Prerogative Law, and ſeems to be as ancient as any Laws of this Realm, and all Prerogatives be without limitations of time; Neither can it be preſumed, that all or any Kings till the time of *Hen.* 6. were ſo improvident as to want theſe Laws, without the which the Realm could not be defended from the violence of that unmerciful enemy the Sea; wherein I do conclude, That theſe Laws of Sewers be as ancient as any other Laws of this Kingdom be.

The extent of this Law.

For the extent of this Law, the Title of this Statute ſhews it, *viz.*, *A general Act for granting Commiſſions of Sewers within the Realm*, without any word of Reſtraint, other then theſe (*where need ſhould require*) And although

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Expounders of the Laws be not tied to make the Title their Text, either for the body or the bounds of it, yet it may serve to give some direction in the Exposition thereof: But to make the Title to be the ground in the material Exposition of the Law, may lead the Expositor many times into error: For in *Stradling* and *Morgans* Case in *Plo. Com.* the Title of the Statute was, *For the true answering for the Revenues of the King*, and the words in the body did extend the same to the Receivers of Subjects; but there the Judges and Expounders of that Law went with the Title in a Statute made in 23. *Eliz.* the Title of the Statute was *For Politique Constitutions for the Navy*; and in that Statute there was a new Fish day provided, which no man would have looked for under such a Title.

Stradling and *Morgan.*

23. *Eliz.*

And *Lucian* an ancient Greek Poet compiled a Book, and in the Frontispiece thereof Intituled the same *A Book of True Reports*; where looking into it, there was not any thing true therein: So it appears though in Acts and Books the Titles and Stiles may give help in the Exposition, and may serve as an Index or Table to finde out the matter, yet it is not fit to relye upon them, but that they may be used or refused as occasion shall serve.

Howsoever there is better concord betwixt the Title and the Body of my Statute, for the corps of the Act perform as much as the Title promised, whereby the Inland Countreys of *Notingham, Northampton, Huntington, Bedford* and the like, may have the use of this Statute as well as the Maritine Countreys of *Lincoln, York, Cambridge, Norfolk, Suffolk, Kent, Sussex, Hampshire, Devon, Cornwal, Gloceſter, Chester* and *Lancashire*, if not in all, yet in part, as hereafter I shall make it appear in my second Lecture upon this Law.

And although both the Statute of *6. Hen.* 8. and the Register, and *Fitz. Nat. Brev.* make all of them mention in those Commissions of the County of *Lincoln* and of no other County, yet doubtless the Lawmakers and Judges of this Realm, and the Expositors did intend then, and did extend them to all the Parts and Counties of the Realm.

And

And yet I take it, that the first Original and the chief use of these Laws, was in the said Maritime Countreys, which stood in most need thereof, and especially *Lincolnshire*, where be the huge great and vast Fens and Marishes: But yet notwithstanding they may serve generally for all the Realm of *England*, as the extent of this Statute I read on hath bounded them.

So herein my conclusion is, That the extent of this Statute is as large as the Realm of *England*.

The necessary use of it.

From the Title I am now come to the Preamble of this Statute, where the words be very solid and weighty; that is, *That the King nothing earthly so highly weighing as the advancing the common Profit, Wealth and Commodity of this Realm*: By the which it may appear, That the making of this Law was of all other thought to be most necessary, and of greatest consequence, when the King preferred the same before any earthly thing: And the Kings care herein became his Royal Person very worthily, because by this Statute Safety was brought to the Realm, and Wealth and Profit to the People thereof; greater and better fruits then which, no humane Law can produce: And the chief execution of this Law was most aptly left to the King, *Ratione regiæ dignitatis suæ*, whose Office doth, as the Philosopher truly saith, contain in it great Vertue, high Understanding, and Divine Wisedom, to whose high Government, as well our Persons as our Laws be committed, and the defence thereof is applied to his grave foresight.

And truly I have taken upon me to reade on those Laws of Sewers, as Mr. *Marrow* did in former times take upon him to Expound in his reading the Laws of the Justices of Peace, hoping this work of mine may prove as acceptable to the Commissioners of Sewers, as that of his was beneficial to the Justices of Peace; the use whereof being no less commodious to the Commonwealth then that of the Peace, being both general Laws of great use and esteem, and my self being for many years past a Commissioner in the

County

County of *Lincoln*, I found that these Laws were dark and intricate, and cause not usually within the reach and understanding of such as were not well seen and studied in the Laws.

And because I found the use of them to be wonderous necessary, I did intend, when occasion served me, to break the Ice, and enter seriously into the Exposition of them. And therefore seeing these Laws being in time most ancient, in extent most large, and for the use most necessary, I have, with your kinde favor, made choise of them to frame my Reading upon; wherein, if upon your perusal you finde any scapes or errors, which may soon fall from Opinion, *hoc amicè corriget*, and such of them as you shall bestow your liking upon, *bis vivere mecum*, and this shall suffice touching my choise made of this Statute.

And as I have formerly declared and delivered the causes which stirred me up, and the reasons which confirmed me to read upon this Statute; Now I do intend to break it up, and I do divide it into these several branches or parts:

1. First, to make provision to resist the over flowing of the Sea upon the large Marsh grounds lying in the Maritime Countreys, which commonly be the fairest for soundness, the greatest for compass, and the best for profit of all the Sheep-walks and Commons of this Realm, which take prejudice and loss only by the rage of the Sea.

2. Secondly, to provide also that the great fresh Rivers and Streams may have their passages made clear, and that their Walls, Banks and other Defences be repaired, kept and maintained, whereby the fair, delightful, pleasant and fruitful Meadows and Pasture grounds which lie in the greatest abundance upon or near the Rivers, Brooks and Streams may be preserved from the inundation of fresh Waters, which many times annoy them, to the great and inestimable damage of His Majesties Subjects, which be Owners and Farmers thereof.

3. Thirdly, whereas Navigation, both for the Exporting of our Homebred Commodities, and for the Importing of

Foraign

Foraign Merchandizes is the chief inriching of this Nation, therefore Ports, Havens, Rivers, and other Navigable Streams and their dependencies, be put within the defence of this Law, being *Ostia & janua Regni*, for that by the maintenance of these the wealth of the Realm is increased, and the Inland Cities, Boroughs and Towns are made partakers with ease and small cost of the Seas Commodities.

Fourthly, likewise this Law giveth redress and remedy for the removing of such lets and impediments as are either hinderances to Navigation, or stops whereby the abundant Waters cannot have their free passage to the Sea.

And fifthly, because in the furrounded grounds there be most commonly the greatest use of Bridges, Calceys, Passages and Ways, therefore this Statute hath taken order for them also, whereby his Majesties people may in those places for their persons and their goods have both *salvum & securum conductum*.

In these five parts be all the whole materials of this great and worthy Law contained; and therefore according to the said division I have framed a Case for the first Lecture upon this Law.

The first Case.

A. Leaseth to *B.* a Mannor on the Sea Coasts for years, which hath *incrementum & decrementum maris* by prescription in the County of *Chester*, and the City there, (where a Commission of Sewers is) remainder to *C.* in Fee, Livery is given and taken by Attorneys at full Sea within the view, the Sea then leaves One hundred Acres of Land with the Shore divided in part from the continent by a Navigable Haven; The Lease expired, *C.* enters, the Prince ejects him, and the King seizeth this Relinquished ground.

My Opinion is, That the King hath a part, the Prince a part, and the Subject a part of this ground, and that it is all within this Statute, but no part thereof within this Commission.

Points of the Common Law.

The Points of this Case be three at the Common Law, and five by this Statute.

1. First, Whether Livery of Lands may be made within the view in another County, or not?

2. Secondly, Whether Livery by the view may be given or taken by Attorneys or not?

3. Thirdly, Whether in this case Livery and Seisin may be made by Attorneys, or that of necessity it must be made to the Lessee for years, and who must joyn in making of the Letter of Attorney to take the Livery? All which Points I must maintain Affirmatively, else *C.* the Subject cannot have any Lands at all.

Points on this Statute.

1. First, Whether the English Seas be within this Realm of *England*, and what Interest the King hath there, and what Interest a Subject may have therein by custom and prescription, and what is meant by the said words, *Incrementum & Decrementum maris*?

2. Secondly, Whose these new Islands be which arise there, and whether they be said to be within the Realm, and what Laws govern the same; for that it appears in my Case, that the ground left between the Sea and the Haven is an Island?

3. Thirdly, Whether the King shall have all the grounds by His Prerogative, or the Subject by the said Prescription, or the Prince as participating of both? or whether every one shall have a part thereof, according to my Conclusion?

4. Fourthly, Whether the grounds left by the Sea be within this Statute and Commission, both or either of them, or neither of them?

5. Fifthly, What a Haven, a Shore, and the Coasts be in definition, and the several properties thereof?

The Readers Argument.

And as it comes to my turn, I intend to maintain the conclusion of my Case: And first of the first Point.

Livery and *Seisin* is one of the most ancient approved

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Ceremonies of the Law which hath been used for conveying of Lands; and the Law hath a more respect thereto then to any other: And it cannot be denied, but that it is the most perfect form of any, by the which the Freehold and Inheritance of Lands is transferred from one to another, and all Subjects may give and take Lands by this Ceremony; but the King only is excepted, whose Prerogative is such, That as Lands cannot be taken from him, as King, but by Record; so Lands cannot be given or granted to him, as King, but by Record: And in the same degree is a County Palatine in his County, because he hath there *Jura Regalia*: And this *Livery* and *Seisin* may be actually and really done and performed, or else it may be done within the view of the Lands intended to be conveyed.

And as touching *Livery* and *Seisin* to be actually effected if the Feoffment contain Lands in two several Counties, and *Livery* and *Seisin* be made in one County in name of both, this will not pass the Lands in another county, because the Land passeth by the Livery, which is local, and not by the Deed.

But in an exchange of Land in two several Counties by Deed, the same is good, for there the Land passeth by the Deed.

But if one make a Feoffment of a Mannor lying in Demesn in the County of *L.* and in services in the County of *M.* these services, and so Rents, will pass by attornment of the Tenants, though they lye in a foraign County, and so of an Advowson appendant, and such like, because those rents and services pass not by the local ceremony of *Livery* and *Seisin*, but by the ceremony of Attornment, which is personal, and depends upon the person which is transitory; wherein I take this difference, That if a Feoffment be made of a Mannor by Parol, the Advowson appendant, Villains Regardant, and Rents and Services by Attornment of Tenants, will not pass to the Feoffee, till the demesns and Lands be first conveyd.

But if the Feoffment be by Deed, then the Rents and Ser-

vious will passe by Attornment of the Tenants, and delivery of the Deeds, before *Livery* and *Seisin* be made to passe the demeasne.

Which seeing that Land in one County will not passe by Feoffment, by expresse Livery made in another County; if then the same may be passed and conveyed by Livery within the view, is the question of our Case: And in my opinion they may, because it is a ceremony performed by the eye, which is a member or instrument which hath his operation by a locke, *Tam procul quam prope*.

But expresse *Livery* and *Seisin*, which is done by the hand, cannot in reason be extended to another place then where the body is. And although the eye be fixed in the head, annexed to the body, yet like the Sun, his beams are carried abroad.

And this Livery by the view, is not a Livery in the County where the body is, but properly in the County where the Land lay, which was the object of the eye; and in this case it is said to be Livery onely, and not *Livery* and *Seisin*, because the *Seisin* is properly when the party enters, and the entry of the party is that which perfects the work, which is in *proprio committatur*. And for authority in the point, 28. *Ed.* 3. *fo.* 11. there is a Case according to my opinion, where the Husband at the Church door, when he was to take one to wife, he made a Deed of Feoffment of Lands lying in another County to the said woman, and then delivered the Deed to her, and shewed her the Land, then they married, and he entred in claiming to her use; and these Lands were thereby well conveyed to the said woman by this Livery within the view, in another County.

28. E. 3. fo. 11.

Now it is fit to be declared, what view is sufficient, for there be two maner of views, The one general, the other special: In the special view, every particular piece of ground is to be seen; but in the general view it sufficeth to take notice of the grounds by the place they lie in: and in my opinion, The general view in my Case will suffice. For if one make a Feoffment in Fee of a whole Island, or of a whole Man-

nor

ner or Town, and make Livery thereof within the view; this is good; and yet it is not possible to view every particular piece of ground at once, for Trees, Houses and Hills might so be interposed, that the view could not be taken of some part thereof, yet notwithstanding veiw of the rest will pass.

Also if Lands be covered with Water, Ice or Snow, these will pass well in a Feoffment or Livery in the veiw.

In *Brook Title View plac.* 101. the Case there may give the rule to our Case; for there it is said in a Writ of view, It is not necessary that all particulars in *Specie* should be put in view, but to see the fields where the grounds lie promiscuously it will suffice, and is a good and perfect veiw. *Brook* 101.

Sed est un auter diversitie concernant veiwe Carf un fait Feoffment de B. acre que gist del auter parte dun Mountaine tout hors del veiwe, la Liverey de ceo nest bone sans expres veiwe tamen tout voile passer per veiwe de parte & sic in mon case un parc gist south le fond del mere ceo non obstant passe vi parcel del manor.

Ascuns voer teneus & ceo Knightley pur un in 28. H. 8. *in Dier ij. Liverey deins le veiwe doit touts foits este fait in cases de necessity ceo urging in respect del chose ou del person, del chose quia laterne gist del furder side dun grand ewe ou in le ewe ou ne puit ofte facile accesse del person, quia ij. le Feoffor ou Feoffee sont lame ou infirme, & detraher ceo in question Feo aye mist mon case quia le Feoffment & Liverey fuit ad plenitudinem maris tamen Feo sue de opinion que Liverey deins le veiwe puit este fait sans ascun matter de necessity ceo urging & ceo Feo collect per le liver de* 28. H. 8.

42. Ed. 3. Fitz. Feoffments 54. when the Son did give back the Lands to his Father as freely as his Father had formerly given the same to him; and this was within the view: and it doth not appear that either this Livery or the other made to the said woman in 28. *Ed.* 3. were made of any necessity urging the same. 42. *Ed.* 3.

And there be some persons which can neither give nor take by Livery within the view, and that is where the Feoffor or Feoffee is blinde: So a Major and Commonalty, Dean and

and Chapter, or other corporate and politique capacities cannot give or take within the view. Some have held a difference, that a Parſon of a Church might not take by Livery within the view to him and his Succeſſors, becauſe that came to him in his politique capacity, which had no Eyes; but if he were ſeized in the right of his Church, that he might infeoff *I. S.* thereof by Livery within the view, becauſe this was a wrong to the Church, and therefore was in the power of his natural capacity, which had Eyes.

A Conceit.

But the main Point in my Caſe is, Whether Livery within the view may be given and taken by Attorneys; and whether the view is ſo incident to the perſon, that it cannot be imparted to another.

It is true, that the perſonal view cannot be lent to another, or divided from the perſon, no more can the perſonal touch or act of my hand be imparted to another; and yet expreſs Livery, which is the deed and act of the hand, may be done *per auter maine*.

7. Reports. *Englefields* Caſe.

Sir *Francis Englefields* Caſe in the ſeventh *Report* of Sir *Edward Cook*, gives us a pretty difference, where the act to be done is unſeparably tied to ones perſon, and where not; as in the Caſe of *Thomas* Duke of *Norfolk*, where upon conveyance of divers Mannors to *Philip* Earl of *Arundel* his Son, there was a Proviſo, That the Duke might revoke the ſame upon ſignifying of his minde under his own proper hand in writing, *&c.* This power of Revocation was not transferred to the Queen by the Attainder of the Duke, becauſe it was inſeparably tied to his own proper hand: But the principal Caſe there of *Englefield*, where the Lands were ſetled upon his Kinſman, with power, That upon tender of a Ring by him he might revoke the uſes, and this was forfeit by his attainder, and the Queen by a Letter of Attorney made to two, did tender the Ring; for this was not preciſely or literally tied to *Englefields* perſon, no more then payment of Money, or ſuch like.

Canc. in *Combs* Caſe.

And ſo in our Caſe, though by the Law I take it that Livery

Livery within the view must be in the view of both the parties, yet this may be done by Attorneys; for as my own hand is not precisely tied by the Law to an express Livery, no more is my own eye expresly tied to this view.

And we see in views in an Assize, the under Sheriff, or the Sheriffs Bailiffs, by his direction, may make the view; and yet the Writ is direct to the Sheriff to do the same; and in those Cases an intellectual view will serve, as if the Jurors know the Land; but such an intellectual view will not serve in a Feoffment, but there the view must be actual. 36. H. 8. Dier. Morse & Penningtons Case.

Yet I take this difference, that if a Letter of Attorney be directed to *A. B.* to make *Livery* and *Seisin*, he cannot do the same within the view, for therein he doth not pursue his warrant; but if the Letter of Attorney be special, to give or take Livery within the view, I am of Opinion, then the Livery may in such a Case be given and taken by Attorneys within the view, as well as in *Combes* Case in Sir *Edwards Cooks* 9. *Report*, where it is affirmed that a surrender of a Copyhold may be given and taken by Attorneys, which is as personal as this is in the taking part, because Fealty ought to be made.

Some things may in this Case be further aleaged in this third point, which I now have in hand, that is, Who must make the Letter of Attorney on the Feoffees part, whether the Lessee for years, or he in the remainder, or both of them: For Lessee for years, it is to be noted, that his Estate hath not any perfection thereby, and he seems himself but a Deputy, and if so, then a Deputy cannot make a Deputy; but yet he is not meerly a Deputy, for if there be two Lessees, the Remainder in Fee to *I. S.* one of the Lessees may take the *Livery* and *Seisin*; yet if a letter of Attorney be made to two joyntly, one of them cannot take it; and if in our Case the Lessee had dyed before entry, the Livery might have been made to his Executors, and powers and authorities cannot be apportioned and come to Executors in such manner; *Ergo*, It is more

then

then a power of a Letter of Attorney for the reasons afore-said, and for these insuing; For the Lessee for years cannot be prohibited from taking his Livery by the Lessor, but a Letter of Attorney may be countermanded; yet the Lessee alone cannot make this Letter of Attorney, neither can he in the remainder make the same, because he could not himself accept of the present Livery, neither can he meddle with the present possession which a *Livery* and *Seisin* yields.

But I am of Opinion, That Lessee for years, and he in remainder, must joyn in the Letter of Attorney, for these Reasons:

1. First, they were both one party to the Deed, so ought they to be to the Letter of Attorney, which is to give life thereunto.

2. Secondly, they be but in Law one Tenant.

3. Thirdly, they should joyn in Advoury.

And in many Cases, the Lessee shall have ayd of him in remainder, for the privity between their Estates; and although the Lessee gets no Estate by the Livery, yet he assists himself thereby, with the ayd and strength of him in the remainder, and the Livery goes through his Estate, and so passeth into the remainder.

Therefore my conclusion is, that they shall joyn in this Letter of Attorney; and hereby I suppose I have conveyed a good Estate in the maner to *I. S.* in the remainder, to maintain my position for him in the end of my Case, and here I end my three Common Law points, and now am come to the Statute.

The

The Readers Argument upon the Statute and Commission.

The Sea within the Realm of England.

FIrst, touching our *Mare Anglicum*, in whom the interest therein is, and by what Law the Government thereof is, is a fit question and worth the handling. And in my Argument therein, I hope to make it manifest by many proofs and precidents of great worth and esteem, that the King hath therein these powers and properties, *videlicet*.

1. *Imperium Regale.*
2. *Potestatem legalem.*
3. *Proprietatem tam soli quam aquæ.*
4. *Possessionem & Proficuum tam Regale quam Personale.*

And all these he hath by the Common Laws of *England*: in the 6. *R.* 2. *Fitz. Prer.* 46. it is said, *That the Sea is within the Legiance of the King, as of his Crown of England*; This proves that on the Seas the King hath *Dominationem & Imperium ut Rex Angliæ*, and this by the Common Law of *England*. 6. R. 2.

The Charter of the Admiral of *England* hath these words in it, *Quod habeat potestatem in causis maritimis ac omnia bona waviata Flotsan Jetsan & Lagan ac omnia bona Mercimonia & catalla in mare deperdita seu extra mare projecta ac omnia & singula casualia tam in vel super mare vel littora crecas vel costeras maris quam in vel super aquas dulces portus flumina rivos aut alios locos superinundatus quoscunque inter Fluxum & refluxum maris cen aquæ ad plenitudinem à quibuscunque primis pontibus versus Mare per totum Regnum Angliæ.* Admirals Charter.

Imprimis, this Charter is under the great Seal of *England*, *quod est Lex Angliæ.* 1.

The King grants to the Admiral thereby power in Maritime Causes, which proves the Kings legal power and jurisdiction on the Seas. 2.

He grants to him *bona in mare deperdita super mare emer-* 3.

gentia & extra mare projecta, which be Profits ariſing on the Sea.

4. And all theſe are ſaid to be *per totum Regnum Angliæ*; *Ergo*, the Seas be *infra Regnum Angliæ*.

Prerogativa Regis, cap. 11. In the Eleventh Chapter *de Prerogativa Regis* it is declared, *Quod Rex habebit wreccum Maris per totum Regnum & Balenas & Sturgiones captos in Mari vel alibi infra Regnum Anglia*: and this was by the Common Laws before ever this Statute was made; for as the King was and is the moſt Excellent Creature within his Realm, ſo the moſt Excellent things which Land and Sea afford are appropriate unto him. And this Statute alſo proves the Sea to be *infra Regnum Anglia*, and that the profits therein, and thereon ariſing belong to the King by the temporal Laws of *England*.

Sir *Henry Conſtables* Caſe. In the Caſe of Sir *Henry Conſtable* in the Fifth *Report* of Sir *E. Cook*, it is ſaid, That *Flotſan, Jetſan and Lagan are goods on or in the Sea, and that they belong to the King, and the King by his Charter granted them to the Admiral.*

Stat: 18. E. 3. 28. H. 8. The Statute of the 18. *Edward* 3. *Let the Sea be open to all Strangers*: and the Statute of 28. *H.* 8. *Chapt.* 15. *If any Treaſon, Murther, or other Felony be done on the Sea coaſt, the Offendors ſhall be tryed in ſuch county as the King ſhall appoint by Commiſſion to be directed to the Admiral and others, to try the ſame* per Sacramentum duodecem, which is by Jury.

31. H. 6. And the Statute 31. *H.* 6. *Chapt.* 4. there is a Reſtraint, That no Subject do attache any Stranger in amity within this Realm on the Sea.

Here the Statute Laws are in force on the Seas, as appears by the examples; but theſe ſeem to tye the perſon only.

Sir *John Davies.* And in the *Iriſh Reports* of Sir *John Davies*, in the Caſe of the Royal Piſchary of the *Banne*, it is ſaid, *That the Sea is the Kings proper Inheritance.*

Bracton. L. 2. *Ch.* 12. And Mr. *Bracton lib.* 2. *Chap.* 12. in his Title *de acquirendo rerum dominio*, ſetteth forth a preſcription in theſe words, *Quod Reges & Antecceſſores ſui fuerunt quieti de Theolonia & aliis conſuetudinibus dandis per totum Regnum Angliæ tam per terram quam per mare*: and many times in that Chapter he reiterates

the ſame words; which is a ſtrong proof that the Sea is *infra Regnum Angliæ*, and that the King Governs there by his Common Laws of *England*; for that preſcription is a main and material point of the Common Law: And the like is alleaged in Sir *Henry Conſtables* Caſe by way of Cuſtome in the Citizens, as of *Briſtol*, to have *Fleiſan* on the Seas between the high water and the low water marks.

So I take it I have proved the King full Lord and owner of the Seas, and that the Seas be within the Realm of *England*; and that I have alſo proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Cuſtomes and Preſcriptions, that the Government therein is by the Common Laws of this Realm.

One Caſe and one Statute ſeem to ſway to the contrary, and that is *Lacyes* Caſe, where one was ſtricken on the Seas, and dyed on the Land, that the Common Law could not try this murther: It is true, becauſe that tryal was to be by Jury, which muſt come out of a proper county, which could not in this caſe, becauſe the Sea was not within county ground, and ſo no Jury could be ſummoned there. *Lacies* Caſe.

And I acknowledge that the King ruleth on the Sea by the Laws Imperial, as by the Roll of *Oleron* and other; but that is only in the particular Caſe of Shipping, and for Merchants and Mariners: But the King hath neither the properties of the Sea, nor the real and perſonal profits there ariſing, but by the Common Laws of *England*, and in proof thereof the Book 15. and 16. *Eliz. in Dyer*, where the grounds gained from the Sea pertained to the Queen, which muſt needs be by the Common Law of *England*; for no Law gives the King any ſoil but only the Common Laws of *England*; ſo this is ſufficient proof for the real profits, and for the perſonal profit the Charter of the Admiralty and other Caſes aforeſaid make it manifeſt. *Le Roll de Oleron.* 15. 16. *Eliz. Dyer.*

And there is a Statute made in 1. *R.* 2. *Chapt.* which reſtrains the Admiral that he do not meddle with any thing done within the Realm but on the Seas; by which it may be collected, that the Seas be not within the Realm of *England*: 1 *R.* 2. *Raſt.* Admiralty.

land: But in my opinion the intent of that Statute did rather limit the Admiral how far he should extend his Jurisdiction, then any way to set forth the bounds of this Realm: wherein my conclusion herein is, That my Statute hath his extent within all the Realm of *England*, and that English Seas being within the Realm, be within the bounds of my said Statute of Sewers, and that Statute Law is in full power on the Seas, as by the Cases and Statutes mentioned formerly doth appear.

Of Islands.

De Insulis. BEcause in my Case in matter, though not in express words there is an Island, therefore it comes now fitly in turn to declare whose the same is in ownership, and what Laws the same is to be governed by: And first, of the definition thereof: *Justinian* in *Suis Institutionibus* saith, that *Insula est locus undiq; circumdatus aquis*, pag. 153. And with this agreeth *Britton*, in his Title of Purchase, *England* of it self is not *Insula*, because it is not *undiq; circumdatus aquis*. But *England* and *Scotland* be one intire Island, and the most famous in the whole world; *England*, take it *per se est peninsula*, that is *pene Insula*, almost an Island, for on all parts it joyns to the Sea, but towards some parts of *Scotland*.

Definitio Insulæ.

Anglia

Scotia.

Peninsula.

Gernsey. *Jernsey.* *Gernsey* and *Jernsey* be Islands on the Sea, but it seems by the Resolutions in *Calvins* Case 7. *Report*, That they be not within the Realm, nor governed by these Laws, because the King hath them by His Title of *Prince*.

Man. The Isle of *Man* was in times past a petty Kingdom, and had a King, but he was onely as a Viceroy, and under the King of *England* as by a Record.

Where *Arnold* King of *Man* made suit to the King of *England* to come into *England*, but whether *Man* be within the Realm or not, seems to be put without question in Sir *Edward Cookes* Case of *Calvin*, and by *Kelwayes Reports*, 21. *H.* 8. that it is not, for there an office found after the death of the Earl of *Darby* by a Writ out of the Chancery

21. H. 8. *Kelwayes R.*

of

of *England* was avoided, becauſe as the ſaid books do affirm *Man* was not within the Realm of *England*, but under the favor of theſe books, that is, no neceſſary cauſe to avoid that Office; for in my Opinion the ſaid Office of the Earl of *Darby* was void, *quia in Man breve Domini regis non Currebat*, and ſo in the county of *Palatine* of *Cheſter*, *breve Domini regis non Currit*, 161. *tamen Committatus Ceſtriæ eſt infra Regnum Anglia.* Mr. *Cambden* in his Hiſtory *de Inſulis* is of Opinion, that *Man* was a Member of the Realm of *England*: and therein he hath theſe words, That *Man* is an Iſland ſcituate in the midway between *England* and *Ireland*. *Sed de qua utriq; terrarum applicari de Jure debuerat ab antiquis non ambigebatur demum in hunc modum lis iſta quievit quoniam advectas perculi Cauſa venenoſos hæc terra vermes admiſit ergo Eam Britannis applicandum Cenſura Communis diſtavit*, by which it may appear, that the Iſle of *Man* was within the Realm of *England*; or at the leaſt a member thereof. *Cambden.*

But I do take the Iſle of *Wight* Originally to be parcel of *England*, and is a part of the County of *Hampſhire*, and was as it were divorced from the continent as was *Cecily* from *Italy*; the one, as Poets feign, was parted from the continent or main Land by an Earthquake, the other, as is imagined, by the rage and violence of the Sea: *Inſula vectis inquit Cambdenus in ſuis inſulis Britannicis, Fol. 707. eſt pars Comitatus Hamtonia & à Continente Britannia avulſa eſt ut Cohæſiſſe videbatur*, for many do imagine that it was torn from the main Land by the violence of waters, as of late years parcel of the *Spurnhead* in *Yorkſhire*, which before did adhere to the continent was torn therefrom by the Sea, and is now in the nature of Iſland: Yet the ſame is within the Realm of *England*, and remains parcel of *Yorkſhire*; and the like is ſaid of the Iſland cald *Silly*, ſcituate Many other ancient Iſlands there be, which being in the Engliſh Seas be parcel of this Realm, which I will paſs over to avoid prolixity. *Wight.* *Cambden 707.*

But in our Caſe a new Iſland is riſen up in the Engliſh Seas, to whom the ſame in point of property and ownerſhip ſhall belong, and what Laws the ſame ſhall be governed by, *Nova Inſula.*

Justinian. by, comes now justly to be disputed of. *Justinian* in his *Institutes, De rerum Divisione*, saith, *Quod insula in mari nata* *Britton 86.* *(ut Delos) est primi occupantis.* And *Britton*, one of our ancient Writers in his book *Titulo Purchase, fol.* 86. saith, That if a new Island rise up in the Sea, *datur primo occupanti*, and agreeth fully with *Justinian* therein; but saith he, If it be taken or divorced from the continent, then it continueth to the former owner; but clearly our Law of *England* doth not agree with either of those Authors in the point of ownership. For if as I have formerly delivered it, the Sea in property, possession and profit, *tam in aqua quam in solo*, belongs to the King in the right of His Crown of *England*, as I take the Law clearly to be, then it followeth as a consequent, That the grounds which was the Kings when it was covered with waters, is His also when the waters have left it; For our Law admits not any thing, either real or personal to go *primo occupanti*; but when an owner cannot be found, the Common Law gives it *Domino Regi*, as Waifs, Strays, Wreck of the Sea, Treasure found, Escheated lands, and such like; so that my opinion is conceived in this, that in point of ownership and property, the said new Island is the Kings.

But yet I am likewise of opinion, That a new Island risen from the bottom of the Sea, although it be within the Realm, yet it is neither within county, Parish nor Town of this Realm, till the King by his Edict or Proclamation have so declared it.

There may be Islands also within the Land compassed about with fresh Rivers, as the Isle of *Axholm* in the county of *Lincoln*, and *Sheppey* in the county of *Kent*, and divers *Bracton. Liber.* others. But Mr. *Bracton* in his Book *de acquirendo rerum* *1. cap. 2.* *dominio*, doth very well deliver the Law concerning his new Islands which arise in great Rivers; his words be these, *Habet etiam locum eadem species accessionis Insula nata in flumine quod si quidem medeam partem teneat Communis est eorum qui pro indiviso ab utrâq; parte fluminis prope ripam prædia possident pro modo latitudinis cujuscunq; fundi que latitudo prope ripam sit que si alteri parti proximior sit, eorum est tanta qui ab ea parte*

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prope ripam prædia possident: Si autem insula in Mari nata sit quod raro accidit occupantis sit Domini Regis non tamen credas proprium alicujus agrum informam insulæ redactæ insulam esse ut ecce flumen dividatur in superiori parte & circuit agrum alicujus & denuo infra in quo casu ejus erit ager cujus prius fuerat: Cavendum quoq; erit in metienda vicinitate insularum quia potest quis in hoc de facili decipi ponatur igitur punctus quod in medio inter utrumq; agrum & secundum hoc si insula Citra, punctum sit vel hujus tant' vel illius tant' erit si autem sit & citra punctum & in ipso puncto & ultra tunc proindiviso: Communis erit ut tantam mihi de ipso insula cedat qua continentur in medietate puncti usq; ad agrum meum. Si autem insula rotunda inveniatur hoc observetur quod omnè quod propinquius est mihi cedat, & ita vicino cedat quod ei vicinius erit.

But whether the Laws of this Realm be of force in the said new sprung up Sea Islands, or not, is a question: It appears in *Calvins* Case, and in the Case of the Tanistry in the *Irish Reports*, That if the King conquer an Island or Nation, the same is no part of *England*, nor the Laws of *England* there in force, till the King shall so declare the same, but the own proper Laws seem to be in force there; but if the King conquer a Nation from an Infidel, there the antient Laws of that Nation upon the conquest are extinct; but the Law is not so of another Christian Region, as *Callis*, *Guyen*, *Bulloign* and the like. And although *Ireland* was under the obeysance of the King, yet the Laws of *England* were not there in force, till the King so declared the same. *Callis.* *Guyen.* *Bulloign.* *Ireland.*

And although *Wales* before the Reign of *E.* 1. was within the Fee of the King of *England*, yet was it not parcel thereof, till the Statute of 12. *E.* 1. so made it; and although that Statute so annexed *Wales* to *England*, yet being but by the word or figure *adjuncta*, the Laws of *England* were not totally in force there till the Stature 27. *H.* 8. so declared them, as is holden in *Rice Thomas* Case in *Plo. Com.* but notwithstanding whether *Wales* be within my Statute, or not, is questionable, for these Reasons following: First, it is *Wales.*

clear

clear that a general Law unstinted and unbounded shall extend to *Wales* as well as to *England*; but our Law grants Commissions within the Realm of *England*, and so precisely prescribes it to bounds, and it may seem that the Parliament took it so in 1. *Mar. Cap.* 11. where Commissioners of Sewers were authorized in the county of *Glamorgan*, which, as may be objected, need not, if *Wales* had bin formerly comprised: and some new Statutes, as that of Alehouses in 1. *Ja. Cap.* 9. and that of Rogues, 1. *Ja. Cap.* 7. extend the same to the Realm of *England* and Dominion of *Wales*, as if *Wales* should not be contained in the words (the Realm of *England*) yet notwithstanding in my opinion this Statute of 23. *H.* 8. extends to *Wales*; for although the Statute of the 1. *Mar.* gave power to Commissioners in Glamorganshire, that was for a special purpose, which, as was conceived, the Statute of 23. *H.* 8. did not in *England* extend thereunto, that as for the carrying away of the sand which was thrown upon their grounds; but in that Statute it may well be perceived, that the Statute of 23. *H.* 8. was of force there; and inserting the words, *Dominion of Wales*, in the said Statute of Poor and Rogues, was rather of superabundance to satisfie some which might *nodum in scirpo quærere*, make a doubt where none was, then that they were there put for any necessity requiring the same: But I am of opinion, that in this new sprung up Island the Laws of *England* are there in force, because when it was Sea the same was under the Government of these Laws; and although the nature and quality thereof be changed, *viz.* Dry Land for full sea, yet the same Laws and Government remain in force; so that I hold this new Island within the Statute, and that the property thereof is the Kings.

Now occasion and time gives me fit opportunity to treat of Grounds which be newly gained from the Seas. If as I have formerly declared, the Grounds be the Kings when they be covered with Waters, it must needs be held an infallible ground, that they be also the Kings when the Waters have left them dry; and when the Waters had their being

being on the ſame, the whole Profit there ariſing did appertain to the King; yet I have known in ſome Countries where the Frontagers have claimed thoſe grounds ſo left, by a pretended Cuſtome of Frontagers, and ſome probable reaſon might be ſhown, wherefore they ſhould have the ſame, for as their grounds was neareſt the Sea, and ſo next to the charge to repair the defence, and next to the loſs where any overflow happened, it might therefore ſeem reaſonable, that as they were put to the greateſt charge, and in peril of the loſs of their Lands, that ſo if Lands were left by the Sea affront them, that theſe Lands might accrew unto them as a reciprocal conſideration for their charge and loſs; but I take it that of late the Law hath in theſe Caſes been oftentimes ruled for the King againſt the Subject; for at *Croſt* in the county of *Lincoln*, 1600. Acres were gained from the Sea, affront the Mannor of ſir *Valentine Brown* there, yet he was put to obtain a grant from the King thereof: and one *Buſhey* of St. *Kegneys* claimed grounds left by the Sea, by the ſaid pretended Cuſtome of Frontage, but they were decreed againſt him in the Court of Wards, in 12. *Jac. R.* in which Caſe I was of Counſel: For it were inconvenient that the ſubject ſhould have Frontage, and yet no bounds preſcribed thereto; ſo that Ten thouſand Acres might be left affront a mans Mannor, which were not fit a ſubject ſhould have this large Inheritance by pretence of ſuch allowed Cuſtome; and I ſuppoſe I may herein ſay in this Caſe, as Mr. *Plowden* doth of his ſilver Mines, That it is inconvenient a ſubject ſhould have the ſilver Mines in his grounds, for ſo might he become richer then the King.

So it is not fitting that a ſubject ſhould have the grounds left by the Sea, when ſo much may happen to be left as the Kings own Lands in the Realm come to; and ſo becauſe *nimium ſe exaltat in prerogativam Regis*, I am of opinion the new gained grounds from the Sea appertain to the King as a Royal Eſcheat, and not to the ſubject; but in my Caſe here is a preſcription where the owner of the Mannor hath *Incrementum & decrementum Maris*; of what force this is of,

is now to be argued, therefore I will now declare what interest a subject can or may challenge in the seas, in grounds gained therefrom.

Personal profits arising on the sea, subjects may have and challenge by custom and prescription, as to have free Pischary on the sea, and a Parson had Tythes of Fish gotten in the sea by the inhabitants of his parish, & yet the sea, nor any part thereof is not in any Parish, but it followed the person.

Sir *Henry Constables* Case.

In Sir *Henry Constables* Case, the Citizens of *Bristol* claimed Flotsan (which be goods floating in the sea) by custom, in *Bracton Chap.* 12. one alleged to be discharged of Toll or Custom on the seas by prescription, in the Case of the Swans; in Sir *Edward Cooks* 7. *Report*, one prescribed to have a game of wilde Swans at *Abbotbery*, in a Creek of the sea, which is a member or arm of the sea: and in Sir *Henry Constables* aforesaid, it is taken and received for Law, that a Subjects Mannor may extend to the low water mark by prescription; and seeing all the sea subject may have in and on the Sea, wherefore then should he not have all the grounds left by the Sea by prescription? To that I answer, That he cannot have claim in any thing by prescription and custome, but that which lyeth in use, which is the life of them both; but lands and grounds which have always been Sea, could not be nor lye in use, and therefore they cannot be claimed, nor the same can be bounded out by prescription or custome; yet lands between the high-water mark and low-water mark the bounds thereof may be prescribed to belong to, or to be parcel of the Mannor, because in every twelve hours, or in every day they lie dry, and so a Subject all that time may have use of them, and so of all the rest of the said things, but in that which never lay in use, no custom or prescription could take hold on, insomuch that in my Opinion, no prescription or custome can fetch lands further then the low water-mark.

Bracton.

Case of Swans.

Grounds

Grounds left.

BUt now what grounds ſhall be ſaid a leaving by the Sea, is a point in my Caſe alſo, for it is certain that at ſpring-tides the Sea uſeth to overflow the *Marſhes* in *Lincolnſhire* and *Norfolk*, and returneth within a ſhort ſpace again; theſe being uſual and annual, be not accounted grounds left or gained from the ſea; ſo becauſe the Marſhes in *Lincolnſhire* and the Sands in *Lincolnſhire* be overflown every twelve hours, and then dry again, are not accounted grounds left or gained from the ſea, becauſe the ſea hath daily her recourſe thereon: and therefore in 15 and 16 *Eliz.* in *Dier fo.* 326. in the Caſe there was a quantity of ground was left by the Sea, and whether the King, or he whoſe grounds were adjoyning ſhould have them, was there made a queſtion; but in that Caſe there is an excellent preſident ſet down, very apt for the handling of this point, put in 43 *E.* 3. *Contra Abbot' de Ramſey de quodam proceſſu in Scacario facto verſus dict' Abbot ad oſtendendum quare Sexagint' acræ mariſci in manus dom' Regis non debent ſeſiri quas predict' Abbas appropriavit ſibi & domui ſuæ ſine licentia Regis ſuper quandam preſentation' virtute cujuſdam generalis Commiſſion' de terris à Rege detentis & concelatis. Abbas reſpondit quod ipſe tenet maner' de Braunceſt quod ſituatum eſt juxta mare et quod eſt ibid quidam mariſcus qui aliquando per fluxum maris minoratur & aliquando per de fluxum maris augetur abſq; hoc quod appropriavit ſibi prout per preſentation' predic' ſupponebatur.* And the Attorney of the King maintained the contrary, and therupon the King and the Abbot were at an iſſue; ſo by the Caſe I gather theſe matters:

15. *Eliz. Dyer* 326.

43. *E.* 3.

Firſt, That if by little the Sea ſometimes decreaſe and leave ſome parcel to the Land, and ſome other times run over the ſame again, this ground belongs not to the King; for theſe be grounds whereto the ſubject may have a property, as in the grounds of the ſhore, but otherwiſe it is where great quantity of ground which had always been drowned before is left, that belongs to the King.

Alſo by this preſident the Law was taken to be, that theſe grounds left by the Sea to the Land, were in the Coun-

ty of *Norffolk*, whereto they did adjoyn, and in my opinion within that Pariſh whereto they lay; for there was a Preſentment, which was by a Jury of *Norfolk*, and the Jury taken to try an Iſſue muſt be *de viceneto ejuſdem commitatus*: but note there, the Preſentment was by a Jury *de Corpore Commitatus*, in 22. *lib. Aſſiſ. pl.* 93. The Caſe was, That a River of water did run between two Lordſhips, and the ſoil of one ſide, together with the River of water, did wholly belong to one of the ſaid Lordſhips, and the River by little and little did gather upon the ſoil of the other Lord, but ſo ſlowly, that if one had fixed his eye a whole day thereon together, it could not be perceived; by this petty and unperceivable increaſe, the increaſement was got to the owner of the River; but if the River by a ſudden and unuſuall flood had gained haſtily a great parcel of the other Lords ground, he ſhould not thereby have loſt the ſame: and ſo of petty and unperceivable increaſements from the ſea, the King gains no property, for *De minimis non Curat Rex*; but put the caſe the ſea overflow a field where divers mens gounds lye promiſcuouſly, and there continueth ſo long, that the ſame is accounted parcel of the ſea, and then after many years the ſea goes back and leaves the ſame, but the grounds are ſo defaced, as the bounds thereof be clean extinct and grown out of knowledge, it may be the King ſhall have thoſe grounds; yet in Hiſtories I finde that *Nilus* every year ſo overflows the grounds adjoyning, that their bounds are defaced thereby; yet they are able to ſet them out by the Art of *Geometry*.

22. *lib. Aſſ. pl.* 93.

The Prince count Palatine of *Cheſter*.

Theſe grounds in my Caſe which are left by the ſea, and lye from the haven next to the ſhore, are as I have formerly delivered it, within the county Palatine of *Cheſter*; and therefore, whether the Prince or the King ſhall have them, is now my queſtion: The Prince hath not only *Jura Regalia*, but alſo *Eſcheta Regalia* within his ſaid Palatinate, and ſo in my opinion is not only owner of the county, but Lord of the Prerogatives there, and all Juriſdiction is to the Prince, only a Writ of Error lieth in the Kings Bench of a Judge-

ment

ment there, like an Appeal to *Cæſar*, then he is Lord of thoſe Laws by which the Freehold and Inheritance of thoſe lands be ruled, wherefore then ſhould not theſe lands belong to his Grace? And firſt it is uſual to have a Commiſſion directed to enquire of theſe Lands *ut de terris concelatis*, and this inquiry ſhall be by Commiſſion; if that Commiſſion be to iſſue out of the county Palatine of *Cheſter*, then the Lands would queſtionleſs fall to the Prince, and the inquiry to be made of the Freeholders of the ſaid county Palatine. The Caſe put in *Barkleys* Caſe in the *Comment.* of Mr. *Plowden, fo.* 129. doth force much againſt the Princes Title; for there it is put, that the Biſhop of *Durham* had Liberties and Priviledges in *Terris ſuis inter Fluvios de Tyne de Teſe*, and afterward purchaſed moe Lands between theſe two Rivers, the ſaid Liberties and Priviledges ſhall not extend thereto; and ſo if one have a Warren in his Lands in *Dayle*, and he purchaſeth other Lands there, his Warren cannot be extended upon theſe new purchaſed Lands, for ſaith the Book, *Things or Priviledges confined to certain Precincts or Dominions, cannot be extended further, though the Dominion be inlarged, and that they ſhall not be inlarged with the inlargement*; but the County Palatine veſted in the Prince, is preſcribed within no other bounds then the word County doth confine it; and therefore this falling to be within the county, ſhould be properly his, and as I am imformed, the Prince hath ſpecial words therefore in his Charters, if it were granted that theſe grounds could be claimed by Charters; but I am clear of Opinion, That no increaſe of the new left grounds can poſſibly become within the county of the city of *Cheſter*; for the bounds thereof cannot extend over that circle which their Charter hath confined them to: and ſo for the cauſes and reaſons formerly declared, I take it, That the ſaid Iſland is the Kings, the ground left between the haven and the ancient ſhore, belongs to the Prince as Earl of *Cheſter*; and the ſhore becauſe of the ſaid preſcription appertains to *C.* the Subject as parcel of the ſaid Mannor; and ſo according to my ſaid con-

conclusion of my Case, here the King hath a part, the Prince a part, and the Subject a part of the grounds left by the Sea.

My Tenets therefore be these:

1. First, that the Subject may have the grounds of the Sea to the low-water mark, and that no Custome can extend the ownership of a Subject further.

2. That a Subject cannot have the grounds to the low-water mark, but by custom and prescription, and I take it that it is very disputable whether grounds before they be relinquished by the Sea, may be gained by Charter and grant from the Crown; I suppose they may.

3. That the words *incrementum & decrementum maris* are fully described by the said Record of 43 *E.* 3. of the *Abbot* of *Ramsey*: that is, That if the decrease of the Sea be by little and unperceiveable means, and grown only in long tract of time, whereby some addition is made to the Frontagers grounds, these by these words may appertain to the subject, and herein the said words have no other operation, but Lands left to the shore by great quantities, and by a sudden occasion and perceiveable means, accrew wholly to the King.

4. That the increase to the said County Palatine, for the causes aforesaid, doth appertain to the Prince as Earl of *Chester*.

The Shore.

BUt now I am arrived at the continent, and the first ground I set my foot on is the shore, which in *Latine* is called *Littus Maris*, it taketh the name wholly from the sea, as partaking most with her nature, and so *Ex digniori parte appellatur*; yet it is not all one with the Sea, nor with the Land, but participates with them both: And Mr. *Bracton* in his second Book, *Chap.* 12. saith, That *Littora Maris accessoria*, what the shore is appears by *Justinian* the Emperor in his *Institutes*, *lib.* 2. *pag.* 141. and is there thus defined,

Bracton.

Justinian.

Littus

Littus Maris eſt quouſq; maximus Hibernicus, & jus fluctus eluderet & quouſq; fluctus Maris in æſtate longius exeſtuat; and with this agreeth *Cicero Topicorum*, *The ſhore is not counted for lands or grounds gained from the Sea, or left by it, becauſe at every full Sea it is covered with the waters thereof*. In the 13. Chapter of *St. Matthews* Goſpel, ver. 2,3. it is ſaid, That our Savior Jeſus went into a ſhip and ſate there, and the whole multitude ſtood on the ſhore, and he ſpake unto them: Hereby it appears, that the ſhore was the dry land, becauſe they ſtood thereon; and it was a great quantity of ground, for thereon ſtood a multitude, and it was near the brink of the water, becauſe they heard Jeſus ſpeak unto them out of the ſhip. In point of property and ownerſhip it is the Kings, as Lord of the ſeas; but as Sir *Henry Conſtables* Caſe is, a ſubject may have the ſame, as belonging to his Mannor by preſcription. In the Imperial Law which the Civilians uſe, the ſea ſhore is held to be common to all, and that it is as lawful for *Diogenes* the poor Cinick, as *Creſſus* the rich King, *Caſum.* 161. *Ponere & retia ſiccare*; but our Common Law of *England* doth in reaſon much ſurpaſſe either the Imperial Law or the Civil Law, in diſtinguiſhing upon theſe; for it is ſaid, *Rex in ea habit proprietatem ſed populus habet uſum ibidem neceſſarium*: ſo that as to the lading and unlading of ſhips, and for drying of Nets there, and for other neceſſary buſineſſes, the ſubjects have theſe uſes therein, but the ſoil and grounds thereof belong properly *dom' Regi*. And a ſubject may have the ſame by preſcription, and therefore ſuch as hold the ſhore to be the extreme point both of land and water be in a great error, for as *Juſtinian* ſaith in his *Inſtitutes*, *Quod gemmæ & lapilli præcioſi inveniuntur*, which can be taken no otherwiſe *ſed ſuper terram aqua relictam*: ſo that this ſhall ſuffice to have ſaid concerning the ſea ſhore.

Cicero.

Mat. 13.2,3.

Sea

Sea Coasts.

THe coasts of the sea come next in order to be treated of: *Costera maris* be words well known, but their confined definition is hard to be found out; yet certainly they contain the shore and banks, for by the Statute of 27. *Eliz. Chap.* 24. an Act was made for the mending of the banks and sea works on the sea coasts; but in the 7. *Chap.* of *Maccabees* coasts have a larger extent, for there *Demetrius* Son of *Seleucus* departed from *Rome*, and came to a city of the sea coasts: here a whole city is set on the sea coasts, and in *Iustine* treating of *Alexander* the great, it is reported of him, that he entred into *Licia* and *Pamphilia*, and won and conquered all the sea coasts; this could be taken for no less then whole countreys; for *Alexanders* great minde and huge Army, could not march on a molehil, or small tract of ground: In St. *Mark, Chap.* 7. it is thus written, *That Jesus departing from the Coasts of Tyre and Sydon, came to Galile*, so that it may thereby be gathered, That these coasts were neer the sea, for our Savior was no sooner out of the coasts but he was on the sea, which shews that sea and coasts be *contiguè Iacentia*, yet no certain definition can I finde of the words *Coasts of the Sea*, but by these and such like descriptions; yet this I gather and collect thereby, that in respect of the whole World, a whole Kingdom lying next may be said to be a sea coast, and a whole county in respect of a Kingdom; and in my opinion the next town and territories thereof lying next to the seas, be in our Law taken to be the sea coasts and no other; and therefore some do much erre which take coast to be the edge of Land next the water, and shore to be the brinks of the water next the Land *quasi duo opposita.*

27 *Eliz.* 24.

Maccabees 7.

Iustine.

And because Creeks, Havens and Ports be all of them within the charge of this Law, and this Statute was materially made in defence thereof, and as they differ in appellation, so they vary in definition, yet they do in some things agree in the material; I will therefore deliver my opinion of them.

Creeks.

Creeks.

CReeks of the ſea is an Inlet of ſea cornered into the main Land, ſhooting with a narrow paſſage into ſome Angle of the Land, and therein ſtretching it ſelf more then ordinary into the Land, and ſo holdeth not even quarter with the Levant ſea; and ſuch Creeks or Inlets we commonly term in the Law to be arms of the ſea: for like as the arm of a man ſhooteth out from the body, ſo by a metaphor the inlet or corner of the ſea let into the Land, is called an arm of the ſea; and although it go far into the land, yet the points of land on both ſides may well be diſcovered: and this appears in that great arm of the ſea on *Humber*, where it runs betwixt *Lincolnſhire* and *Yorkſhire*, the points of either county may be ſeen at once, and ſeem to ſtand even over the one to the other.

Arm of the Sea.

ANd an arm of the Sea is ſaid to extend into the Land ſo far as the flow and reflow goeth: In the Patent of the Admiral of *England* I finde this word *Creek* uſed; for there the King granteth to him *omnia bona mercimonia & Catalla in vel ſuper Mare littora creas & Coſteras Maris*, but it differs much both from the ſhore and coaſt; for a ſhore is ſometimes dry Land, and ſometimes water, a coaſt is always dry land, but the Creek is always ſea and new land: In the Statute 28 *H.* 8. *Chap.* 15. *Raſtals* tryal, *A.* It is that all felonies, &c. done upon the Sea, Haven or Creek, where the Admiral hath Juriſdiction, ſhall be tryed in ſuch county which the King ſhall appoint; by the Statute it is manifeſt that the Creek is not all one with the ſea, nor the ſame that a Haven is, by the Statute made in the 4 *H.* 8. *Chap.* 20. *Raſtal* ſhips, 5. appoints that all Merchandizers entring in or going out of the Realm of *England*, ſhould be charged and diſcharged in great

4 *H.* 8. cap. 20.

Diverſity between the ſhore.

A Coast. A Creek. great Ports, and not in Creeks or ſmall arrivals; by which Statute it is apparant that a Creek is not all one that a Port is: But yet here it ſeemeth to be an Inlet of the ſea where ſhips may have their arrivals, as at *Faſdyke*, *Stow*, *Wainfleet*, and ſuch like, and I take it that a Bay and a Creek be all one, and that a Mere and a Fleet be alſo of that nature, and that all theſe rather vary in words then in matter.

Creek. Bay.

Fleet & Mere.

A Port.

A Port is a harbor and ſafe arrival for ſhips, boats, and ballengers of burthen, to fraught and unfraught them at, as by the ſaid Statute of 4 *H.* 4. appeareth: In the *Iriſh Reports*, *Fol.* 56. Ports be ſaid to be *Oſtia & Ianuæ Regni*; I take a Port to be ſome ſpecial place in ſome great Borough, where arrival of ſhips be, as the Cinque Ports, which be *Dover*, *Sandwich*, *Rye*, *Rumney*, and *Winchelſey*, the moſt famous in this Realm, and theſe be places of great priviledges: and *Boſton*, *Hull*, *Lyn* and *Plymouth*, be alſo Ports and Port Towns, where ſpecial offices & officers belonging to them, touching Merchants & Merchandizers. And the ſaid Statute of 4 *H.* 4. directed that Merchants ſhould be charged and diſcharged at great Ports, was for that there were Officers for the King, deputed to receive His Highneſs cuſtoms and profits thereupon ariſing; hereupon came that Officer called Portgreve, which ſignifieth the Governor of the Port, as Mr. *Cambden* noteth *page* 244. the difference between a Creek, a Haven and a Port, be theſe;

Holling-ſhead. Cro: p. 120. 6.

Cambden 244.

Diverſity between a Creek, Haven and Port.

A Creek is a corner of the ſea let into the land farther then ordinary, and more then the ſea is, but it is no uſual or accuſtomed place of arrival for ſhips; and commonly it hath neither ſafe harbor nor legal priviledge.

A Haven is properly a ſafe place of harbor for ſhips, but may be without any priviledge at all, of which kinde I know ſome.

And

And a Port is not onely a ſafe harbor for ſhips of the greateſt burthen, but it is alſo always graced with legal priviledges; and this appears ſo by the Statute of *Magna Charta*, cap. 9. *Quod omnes Communitates & Barones de quinq; portibus & omnes alii portus habeant omnes libertates & liberas Conſuetudines*, which proveth my former diſinition of Ports to be true. *Magna Charta cap. 9.*

After all theſe diſinitions and diſtinctions, I have now prepared my Caſe ready to receive his cenſure upon the laſt concluſion; that is, That all the ſaid grounds were within this Statute, but no part thereof within this Commiſſion of Sewers: and therefore it is firſt to be noted, That theſe grounds were left by the ſea ſince the awarding of this Commiſſion, and the words of the Preamble of this Statute ſpeaks of grounds heretofore won; which word (*Heretofore won*) ſeemeth to tie the Statute and Commiſſion, both to grounds left or won before the ſaid Statute, and not ſuch as be won after, like to the Statute of *Weſt. 2. de Donis conditionalibus quod ad dona prius facta non extenditur*, which excludeth out of that Statute all gifts made before. And the words (*Heretofore and hereafter*) are words of conſequence in point of time; and whereſoever they are ſpoken, they come with an *Emphaſis*, as if they required expreſs obſervance; and ſo is the Statute of 32 *H.* 8. *cap.* 28. of Leaſes, that Statute is of all Leaſes hereafter to be made by Covenant in tail, with ſuch cautions and proviſo's as be limited and ſet down in that Statute, ſhould be good Leaſes formerly made, though all the proviſo's in the ſaid Statute were obſerved, were notwithſtanding by reaſon of the ſaid word *Hereafter* out of the relief of that Statute.

And ſo in the Statute of *Wills* 32. *H.* 8. which had theſe words in it, *All perſons having Lands, or which hereafter ſhould have, might deviſe*; this did not make good any deviſes of Lands made before: but if this ſhould paſs for currant, then I ſhould not perform my word in my concluſion, which puts it all within the Statute; and this exception, if it were material, would not put it onely out of

the Commiſſion, but the Statute alſo; yet notwithſtanding though the conſtruction made of all the ſaid former Statutes, ſtand with Law, by reaſon of the ſaid words (*Heretofore* and *hereafter*) yet in this Statute of Sewers, the ſame be not material, neither be the ſaid words (*Heretofore won*) to be preciſely obſerved, becauſe they be placed in the Preamble of the Statute, and not in the enacting part of the Law, as in the ſaid former Statute they were: And Expoſitions are not tyed to Titles and Preambles, which many times comes ſhort of the parts of the Law, but to the body and enacting part of the Statute, which is the matter and ſubſtance: And hereupon the Statute of 21 *H.* 8. *cap.* 15. of Leaſes recites in the Preamble thereof, *That whereas divers Leaſes had aforetime been made for Incomes and great Fines, and yet after the Leſſors did ſuffer Recoveries, if at this day a Leaſe be made, and that without Fine or Income, yet ſuch a Leſſee ſhall be received to falſifie the recovery had againſt his Leſſor notwithſtanding:* The Preamble of that Statute ſeems to remedy no Leſſees, but ſuch as made Fines and were made before that Statute, but the ſaid words were not put in the body or enacted part of the Statute: and ſo it is in our Statute; the words (*Heretofore won*) be only put in the preamble and not in the material part of the Law, and ſo the Expoſition is not to be tyed hereto; ſo notwithſtanding this exception, theſe grounds though gained ſince the Statute, are within the relief thereof.

The ſecond cauſe wherefore theſe new grounds ſhould not be within this Law, is, Becauſe theſe Lands be increaſed beyond the bounds ſince the making of theſe Laws, and ſo it may be alleaged that they cannot extend to the new inlargement: for Mr. *Plow.* in his *Com. fol.* 129. ſaith, *That Laws and Priviledges tied to a certain Place or Precinct, cannot be extended or inlarged beyond the ancient Bounds, although the Precinct be inlarged.* As the Caſe in 7 *H.* 6. *fol.* 32. where in a *Nativo habendo*, a Villain had remained a yeer and a day in *London*, which was ancient Demeſn, and there was a priviledge, that every Villain and Bondſlave which had remained

Plow. Com. fol. 129.

7 *H* 6. fol. 32.

mained a day and a year in *London*, the Lord might not ſeize him; and the Villain pleaded that he had remained a year and a day there, and ſo took himſelf to be within that priviledge; but becauſe ſince the ſaid liberty granted the bounds of *London* were much increaſed, therefore it was there held, that the ſaid liberty and priviledge did not extend to the new inlargement. And the Caſe is alſo put in the ſaid *Coment.* that the Biſhop of *Durham* had divers liberties in his Lands lying between the two Rivers of *Tyne* and *Teſe*, and after he purchaſed other Lands there, the ſaid liberties did not extend to the ſaid new purchaſed Lands; and the like Law is if one have a Warren in his Mannor and Lands in *Dale*, after he purchaſe more grounds there, his Warren doth not extend unto them. And ſo where one had by Charter the Lands of perſons forfeited for Treaſon, he could not have by the ſaid ancient Charter, Lands forfeited for Treaſon by Tenants in Tail, becauſe the forfeiture of them was given by a late Statute ſince the Charter, but *his non obſtantibus:* I am of Opinion, That this Statute I now treat on extendeth to theſe new gained grounds: and I take a difference between a ſpecial Law of Priviledges, and Liberties which is ſtinted or bounded either by Statute, Charter or Cuſtom, the ſame can by no conſtruction be made to exceed the bounds; but the general Law of this Kingdom, as this Law of ours is, the extents thereof be as large as the whole Realm is, and they be not tied to ſtinted limits, as particular private Charters and Cuſtoms be; and ſo I conclude, That in point of extent, this Statute of 23 *H.* 8. is tied to no other bounds then to the Kingdom of *England.*

Diverſity between grounds gained and grounds left.

THe third matter is that which I have grounded the concluſion of my Caſe upon, and that is, Whether the grounds in my Caſe newly left by the ſea to the ſhore, and the ſhore be ſuch grounds as be within this Commiſſion?

And

And in my opinion they be not: And therefore to maintain my opinion herein, I take a difference between grounds left by the Sea, and grounds gained from the ſea; for grounds left are of no value, and bring forth no fruit or encreaſe at all, but the uppermoſt part thereof are ſand, which theſe Laws take no hold of; for the Commiſſion extends only to grounds won and made profitable for the Commonwealth of this Realm, which *Terra relicta* yield not, for no profit at all thereof ariſeth, till the ſand be inned and gained; and theſe Laws made the Commiſſioners *Savers* and not *Gainers*, and therefore did extend the Commiſſion but to the uttermoſt banks and walls, and left the ſhore as grounds poſſeſſed by the ſea, and ſo be put *pro in defenſo* by this Law; and therefore I do make my concluſion as followeth:

1. Firſt, That the Seas, Creeks and Bays are all within this Statute in point of extent; but that they and the ſhores, and the relinquiſh'd grounds, be all of them out of this Commiſſion of Sewers to be dealt withal thereby.

2. Secondly, That Ports and Havens are totally the waters, as well as the walls and banks thereof, within the Commiſſion of Sewers.

3. Thirdly, The ſhore and grounds left by the ſea when they are put as in Gainage, are then and not before within the power of the Commiſſion of Sewers.

4. Fourthly, although the grounds left by the ſea are not in point of defence within the Commiſſion of Sewers, yet a wall or bank may be thereon raiſed for the aid and ſuccor of the countrey, but not for any cauſe where the defence extends but to themſelves. And although the grounds that have been gained from the ſea in the county of *Lincoln* and elſwhere in this Realm, yet that was done at the labor of private men, and not by the Commiſſion of Sewers, which aims at the general good, and not at private Commodities.

So that *Super totam materiam*, I am of opinion with the concluſion of my Caſe, that is, That the ſaid new Iſland is the

the Kings, the grounds left to the ſhore pertains to *C.* the ſubject; and that becauſe they are all of them within the Realm of *England*, they are therefore within the extent of this Statute: But in regard they are grounds left only, and not gained nor made profitable for the Commonwealth of this Realm, they are not therefors within this Commiſſion. And ſo I conclude my Argument as I did my Caſe: in which, I hope, I have neither injured the Subject in his private Inheritance, nor wronged Prerogative in any point.

Finis primæ Lecturæ.

Initium.

Initium ſecundæ Lecturæ.

FOraſmuch as the firſt day I went perambulation about the Sea, and of all which belong to her Empire and Dominion; wherein I did ſurvey her bounds, her qualities and her government: Now I do intend to go a progreſs through the Land, and to take a view of the fair goodly Rivers which make their voyage to the Sea, for theſe my Statute hath taken into her protection. And this ſecond day I purpoſe to call a Court of *Oyer* and *Terminer*: And I do intend, with your gentle patience, to examine all the particulars there ariſing. And becauſe the ſaid Statute of 23 *H.* 8. muſt be my chief guide to direct my faireſt paſſage through theſe uncouth ways, I will pray aid thereon; and I will now proceed to declare what buſineſs on Land this Law hath undertaken to defend, and what offences it purpoſeth to reform: And accordingly the ſaid Law doth diſtribute it ſelf into theſe particular Branches:

First, Into matters of defence this Statute maintaineth, are theſe following, *viz.*

1. Walls.
2. Banks.
3. Ditches.
4. Gutters.
5. Sewers.
6. Goats.
7. Calceys.
8. Bridges.

1.

2. Secondly, Into matters of Offence which this Statute termeth Lets, Impediments and Annoyances which are to be put down or reformed, as cause shall require;

1. Streams.
2. Mills.
3. Ponds.
4. Fishgarths.
5. Mildams.
6. Locks.
7. Hebbingwers
8. Hecks.
9. Floodgates.
10. Other like Lets and Impediments.

And to the end I might fully examine this part of the Statute which produceth these matters, I have framed a Case, which doth give occasion in this days exercise to dispute of all them.

The Case for the second Lecture.

Second Case. A. Leaseth his Mannor in the county of *Lincoln*, in which be Copyholds, to *B.* a yonger Son for his life, upon condition to have it for the life of *C.* upon condition to have it to him and the heirs of the body of his Father. A Copyhold is forfeit, the first Condition is performed, the Commissioners of Sewers in that county upon view survey, and by their discretion decree a new bank where none was before to resist the Sea, and a new River to be cut to drain the superfluous waters in *S.* and an old Sewer in *D.* to be repaired; and by inquisition assesses *B.* the Lessee for the Mannor, the Copyholder for the Copyhold Land, and the Town of *S.* and also the Parson there for his Tythes, because they lie all in the Level; the second condition is performed, *B.* enters in the Copyhold.

My conclusion is, That this new Bank, new River, and old Sewer be well decreed, but the said fesse is void *in toto & in qualibet parte.*

Points

Points at the Common Law.

The Points of this Caſe are three at the Common Law, and three upon this Statute; but all of them are ſo woven within another, that every one of them go hand in hand from the beginning to the end of the Caſe.

Imprimis, Whether the Duplicate Condition be good, or not? 1.

Secondly, What Eſtate *B.* the yonger Son hath by the firſt Condition, and what Eſtate he hath got by the ſecond? 2.

Thirdly, A Copyhold becomes forfeit to the Lord, and before the Lord take advantage of it his Eſtate is changed, Whether by the change of his Eſtate the benefit of the forfeiture be loſt, or not? 3.

Points upon the Statute.

Imprimis, Whether Commiſſioners have power to decree a new bank, a new drain, and other new defences, or not? And herein the qualities and properties of Rivers, Streams and Banks, and their dependants, are to be treated of. 1.

Secondly, Whether they may decree the ſaid new defences by view and ſurvey? And herein is to be handled, What Commiſſioners of Sewers may do by ſurvey, and what they may do by their diſcretion, and what they may do by Jury. 2.

Thirdly, in what caſes Aſſeſſes and Taxes may be laid and impoſed, and on what things, and in what maner they are to be impoſed; and whether the Rates ſet upon the perſons in any caſe be well done or not, and where the fault is if any be. 3.

Argumentum Lectoris.

Seeing it hath been the ancient order for the Reader of this place to maintain the Concluſions of his Caſe, I ſhall therefore endeavor my ſelf to perform that order which Cuſtom hath impoſed upon me; and accordingly as I have concluded, ſo I take the Law to be.

And touching the firſt Point, it hath been challenged and drawn in queſtion upon ſome Opinion delivered in the Re-

Sir Ed. Cooks 1 Report.

ctor of *Cheddingtons* Case in Sir *Edward Cooks* first *Report*; where it said, *That one contingent cannot depend upon another*: But more strictly it is called to an accompt in the Lord *Staffords* Case in Sir *Edward Cooks* eighth *Report*; for there it is held, *That one possibility cannot depend upon another possibility*, and this Case is there put, *That if* A. *let Lands to* B. *for years, upon condition to have it for life, and upon condition to have Fee, that the Fee simple can never increase by the second condition*; but as he saith in another Case, *Amicus Plato Amicus Socrates sed magis amica veritas*, his rule taken in the first Case is very general, and the Lord *Staffords* Case admits distinctions, which in my Argument I shall apply my self unto.

Cook, Rep. 8.

And some differences I shall take in this Point in question; therefore I shall thus distinguish, That if upon performance of the first Condition, the Original Estate be determined upon which both the first and second Condition were built and grounded, the second Condition and increase thereupon is utterly void; but if the first Estate be not destroyed nor confounded upon the first Condition performed, the second Condition and Estate thereof which shall be gotten thereby, may then well grow upon the old stock. To explain this by Example, If *A.* give Land to *B.* in Fee simple, upon condition to have the Land in Tail, upon condition to have for Life; here because the first Estate and Livery by the first Condition is not destroyed, therefore the second Condition should well stand in force. So I do make a Lease to *A.* for twenty years, upon condition to have the Land for forty years, upon condition to have Fee; this first Condition and second Condition may have both their full operations: for by the performance of the first Condition, the lease of twenty years is not destroyed, but stands on foot; and therefore the original Estate remaining unconfounded, the Fee simple may well increase by the performance of the second Condition: But if a Lease be made to *A.* for his life, upon condition to have in Tail, upon condition to have Fee; the second Condition here

here is utterly void, becauſe by the performance of the firſt Condition, *A.* had an Eſtate in Tail, which drowned and deſtroyed his Eſtate for life; and ſo becauſe every decreaſing and increaſing Eſtate is to depend upon the firſt Eſtate which receives the Livery, which is the life of all, therefore the ſecond Eſtate can never accrew in this caſe: and this is true reaſon, as I take it, of the ſaid Caſe put in the Lord *Staffords* Caſe; for there the Caſe for years was deſtroyed by the Leaſe for life, which came by the firſt Condition, and ſo the Fee ſimple there could never accrew by the ſecond Condition. And in anſwer to the ſaid general ground taken in the Rector of *Cheddingtons* Caſe, *That one contingent or poſſibility cannot depend upon another*; under favor I take it, not that I am bound thereby, neither was it the meaning of Sir *Edward Cook*, as I take it, to extend the ſame ſo largely as they are there put, becauſe I finde many Authorities of great account which are againſt the ſaid general poſition.

Lord *Staffords* Caſe.

Rector *de Cheddingtons* Caſe.

And firſt in the 38 *H.* 8. *Br. Feoffments, pl.* 71. a Feoffment was made to the uſe of *A.* and his heirs, until *I. S.* paid him Ten pounds, and then to *I. S.* and his heirs, and ſo to the third perſon; and what is this but one condition, contingent and poſſibility to depend upon another, for theſe contingents there were held good, and were built upon a ſure foundation.

38 *H.* 8.

And ſo in *Digs* Caſe in Sir *Edward Cooks* Reports, where a Feoffment is made to the uſe of *A.* and his heirs, with power of Revocation, and after of new Limitation of Eſtates, theſe be alſo contingents and poſſibilities depending upon others, and many ſuch double contingents may be put.

Digs Caſe.

The Caſe of Sir *Edward Cook* put in the end of the Rector of *Cheddingtons* Caſe out of 12 *Lib. Aſſ. pl.* 5. in my opinion doth not diſallow the ſecond Condition; for there the Caſe is, *That* A. *Leaſed to* B. *upon condition, That if* A. *or his heirs pay to* B. *Ten pounds within a certain day, that they might re-enter; and if* A. *nor his heirs ſhould not pay the Ten pounds*

12 *lib. Aſſize*

pounds within the time; Then if B. *paid to* A. *Ten pounds at another day, that he ſhould have Fee: Both* A. *and* B. *failed in payment, and* A. *entred, and being put out, brought an Aſſize, and* nihil Cæpit per breve; this doth not prove that one condition cannot depend upon another, neither can I ſee well what Expoſition to make of ſo uncertain a Caſe, ſo that I take this Caſe to be no evidence againſt mine.

14 *H.8. fol.* 15. But in the 14 *H.8. fol.* 15. there is a Caſe which in my opinion makes more againſt my double condition then any other, which is put by *Brudnel* Chief Juſtice; that is, If *A.* be bound in an Obligation to *B.* upon condition to infeoff *I. S.* before Eaſter enſuing, then the Obligation to be void; and if he do not infeoff him, then to pay Ten pounds at Pentecoſt, then the Obligation to be void: The Feoffment is not made before Eaſter, therefore *Brudnel* held the Obligation was forfeit, and that the ſecond Condition was not good: But there is a (*Quære*) ſet upon that Caſe, and ſo it may well be, for I ſee it commonly done, that if a defeſans be made of a Statute which is broken, and ſo the Statute becomes forfeit, yet a new defeſans may defeat it; and ſo in my opinion may the ſecond Condition in this Caſe avoid the Obligation, if the firſt concluſion had not been in the Caſe.

A Conceit. I ſhall adde this Caſe alſo as a conceit; that is, *A.* infeoffs *B.* upon condition, if *A.* go to *Lincoln* he ſhall have the Lands to him and the heirs of his body, and if he go to *Boſton* he ſhall have it for Ten years; and he goes firſt to *Boſton.*

I do here hold theſe Conditions being put promiſcuouſly, without diſtinction of the times of the Conditions which ſhall be firſt performed, and which the ſecond, that the Fee is decreaſed into an Eſtate for years, and can never increaſe into an Eſtate in tail by performing of the ſecond Condition, becauſe the Livery out of which it ſhould grow was quite deſtroyed by the firſt decreaſer. So that my intent appears, that one Condition may depend upon another upon the ſaid diſtinction; but whether by the performance

Second Point.

of

of the firſt Condition in my Caſe there will an Eſtate come to *B.* or not, I meant it for a queſtion: for *B.* had before an Eſtate for his own life; then is it not poſſible that his Eſtate can hereby be increaſed by having the Land alſo for the life of *C.* if it be admitted *argumenti gratia*, that *B.* ſhall or may have both theſe Eſtates ſtand in him both at one time: for if *C.* dyed firſt, then is *B.* never like to have any benefit thereof: And if *B.* himſelf ſhould dye before *C.* then alſo were it impoſſible for *B.* to make any uſe of this Eſtate for the life of *C.* unleſs it were in him to grant away to another, as in the Caſe of the Office in the 1 *H.* 7. where an Office is granted to the King, the King could not have the Office himſelf; and ſo in that point for the King to take by the grant, he could not, yet by that book it was in him to grant over to another which might have it. And like to this is the Caſe where *I. S.* is Parſon of the Church of *Dale*, and the Patron grants the next avoidance, this grant can he himſelf take no benefit by, unleſs he reſign, yet if he dye it ſhall come to his Executors. 1 *H.* 7. 29. *Crofts* Caſe.

But I take the Law to be in my Caſe, that *B.* ſhall not by the firſt Condition have both the Eſtates in him at once, that is, for his own life, and after for the life of *C.* but that the Eſtate of *B.* by the firſt Condition, ſhall be decreaſed or changed from his own life into the life of *C.* and ſhall be melted and newly molded by this Condition; for an Eſtate may as well decreaſe as increaſe by a Condition: and yet the Lord *Staffords* principal Caſe was, *That Queen* Elizabeth *did grant the Mannor to* Tindal *and the heirs of his body, upon condition upon payment of Twenty ſhillings to her by* Tindal, *that he ſhould have the Reverſion to him and his heirs*; and there it is holden for Law, that by the payment of Twenty ſhillings, the Reverſion in Fee ſimple ſhall increaſe to *Tindal*, and ſhall not alter or drown the Eſtate Tail, which is an excellent Caſe, but alter the putting of that Caſe, and then it may alter the Law alſo; that is, I give Land to *I. S.* and the heirs of his body, upon condition if he pay me Twenty ſhillings, that he ſhall have the A Conceit.

the said Lands to him and his heirs: In my conceit by the performance of this condition, the Estate Tail, is by increase changed into a Fee simple; in which, note the difference between *Tindals* Case and this, where upon payment of 20. s. the reversion is granted to him and his heirs: and where the words be, *That upon payment of Twenty shillings he shal have the Lands to him and his heirs*: In the first Case, the Fee-simple accrewing shall not alter the Estate Tail, but in the second Case, by the Fee increasing, the Estate Tail is determined and changed into a Fee simple, *quod quære.*

Admitting the first condition did increase the Estate of *B.* from his own life to the life of *C.* and the second condition is performed, by the which another Estate will accrew to *B.* as I take it will, because an Estate decreased, is parcel of the first Estate; then what Estate *B.* hath got by this new Limitation, is the question: And in my Opinion, he hath at the most but gotten an Estate again for his own life, and that the Limitation to the heirs of the body of his father is utterly void, be his father dead or alive; for if his father be dead, his elder brother is the heir of his body, within these words of Limitation, who cannot take the Lands by descent from *B.* his Brother, or from his Father; but as the Case is put in *Littletons* Title *Tail*, and in the 4. and 5 *Ma.* in *Dier Ereswoulds* Case, where Lands were given to the eldest son, and the heirs of the body of his father; this is a good Estate in Tail, being made to the eldest son, because he is capable to take the Lands in both degrees. And in 2 *E.* 3. the Case is famous, and is known by the name of *Roberges* Case, where Lands were given to her and to the heirs of the husband of her body begotten; and it was there held, That if her husband were then dead, and left any heir which he had by her, they might take joyntly with her; for that it was not possible to take by descent from the said *Roberges*, because he which takes it must not be heir to her, but to the husband, who never held any Estate therein: And so to be short, I am of Opinion, That no estate of inheritance be

Littleton estate Tail.

4 & 5 *Ma. Dier.*

2 *E.* 3.

be gained by *B.* by theſe words, *The heirs of the body of his father.*

The Caſe upon the third Point is this, a Mannor is granted to one for his life, upon condition to have it for the life of *C.* then a Copyhold is forfeit, and before the Lord ſeize, his Eſtate is altered or changed; if now he can take advantage of this forfeiture or not, wherein the altering of the Eſtate of one to another is of like force, as where it alters in the parties ſelf, againſt which it may be ſaid, *That if Tenant for life make waſte, and then he in the reverſion grant over the reverſion, the Grantee ſhall not now puniſh this waſte*; and ſo Mr. *Perkins*, fol. 20. *If a Tenant alien in Mortmain, and then the Lord grant away his Signiory, the Grantee ſhall not enter for this Mortmain*: ſo by *Fitz.* in his *Nat. bre.* in his *admeaſurement* of *Dower*, *If a Garden aſſign to a woman more dower then ſhe ought to have, and then grant his Gardenſhip over, the Grantee cannot have an admeaſurement of Dower againſt her*: and ſo *Binghams* Caſe in Sir *Edward Cook* 2. *Rep.* where there was Tenant for life, remainder in Fee of a Tenancy holden by Knights ſervice, and he in remainder died, his heirs within age, and then the Lord granted away his Signiory, and then Tenant for life dyed, by which the ſaid heir was to have been in ward; yet becauſe the Signiory was granted away after the inception of the Wardſhip, before it was perfectly due, it was there held, that neither the grant nor the grantee ſhould have the ſame: So Leſſee for life without impeachment of waſt, remainder for his own life, the priviledge is loſt; but yet notwithſtanding, I do hold that in this Caſe *B.* after he hath by the performance of the Condition altered his Eſtate which he had when the forfeiture was committed; yet ſhall he afterward take advantage thereof well enough: As if there be Tenant for life, the Remainder for life to *I. S.* and the firſt Tenant for life commit waſte or forfeiture, he in the reverſion cannot puniſh this during the life of him in the remainder for life, but after his death he may; alſo if one make a Leaſe for years, upon Condition to be void, and the Leſſor grant away his reverſion, the

Third Point.

Perkins, fo. 20.

Fitz. Nat. bre.

Binghams Caſe, *Cook* 2 *Rep.*

Bokenhams Caſe in *Dier.*

Grantee may enter for breach of this Condition by 11 *H.* 7. 17. and yet here the Estate in reversion is altered from one to another; and I doubt not, but if a Tenant for life be the remainder in Fee to another of a Mannor, and a Copyhold is forfeit, and then Tenant for life dyed, that he in remainder may enter into this Copyhold; and yet this Estate is altered into a possession from a remainder; and in the Case, although the Estate in *B.* be altered, yet it is by decreaser, and so thereby it is parcel of the old Estate he had before: and therefore it is like to a Case where the husband and wife were Tenants in special Tail, and they recovered by Assize, and then the husband dyed, and after his death without issue, the wives Estate being altered from an Estate Tail, into an Estate of possibility of issue extinct, was again put out and disseized, and she brought a Writ of Redisseisin, which will not lie but on the first Estate, and against the first parties, and yet it was maintained, because it was parcel of her former Estate: And so in this Case, although the Estate of *B.* was altered from his own life into the life of *C.* yet I am of Opinion, That he might take advantage of this forfeiture, because the Customary Estate is utterly void thereby.

11 *H.* 7. 17.

2 *H.* 4. 17. & 26 *H.* 6. title *Ayd pl.* 77.

Points upon the Statute.

I am determined before I enter into the discourse of new defences in my Case, to deliver my Opinion touching the Walls, Banks and other ancient defences, which have had their being time out of memory, and in truth be the very materials and memorials of Antiquity: And because Banks and Walls be the first named in the Commission, they shall therefore have the first place in my argument, being the most ancient and approved defences, as well against the rage of the Seas, as against the violence of fresh waters, that either Art or Nature have produced.

Bank.

Bank.

THe Bank of the ſea is the utmoſt border of dry land, and is of the ſame materials with the grounds wherein and whereon it ſtandeth; it is ſometimes natural, and in ſome places artificial: Natural, as Mountains raiſed higher then other grounds adjoyning as it pleaſed the Creator, when the firſt huge *Chaos* was ſeparated, divided and diſtributed; Artificial, when it is caſt by mans hand. *Juſtinian* the Emperor treating of theſe in his *Inſtitutes*, and his title *de rerum diviſione* deſcribeth them in this maner, *Riparum uſus eſt publicus illar' verò domin' ad eos pertinet qui proximior prædiis domini ſunt, ita q. naves ad eas appellere funes arboribus ibi natis Religare onus aliquod*, in his *Reponere cuilibet liberum eſt*, by which authority it appeareth, that the ownerſhip and property of the ſea bank and banks of great Rivers, be to them whoſe grounds are next thereto adjoyning, and the Trees, Graſs and other things thereon growing, belong to the owner of the ſoil, but the uſe of the banks is common to all the Kings liege people, as to tie the ſhips and boats to the Trees, and to tow them to and fro, and to lade and unlade their Merchandizes thereon, and for fiſhers to dry their nets on. And as the owner of the ſoil and proprietor of the grounds, cannot juſtifie the digging or caſting of them down, whereby the people ſhall be hindred of their neceſſary uſe thereof, no more can the people which have but *neceſſarium uſum*, fell up the Trees, or mow the graſs thereon growing, neither ought they to dig ballaſt there, but every one, as well owner as uſer, *Sic uti ſuo ut alienum non lædat.* I cannot more aptly compare a Bank of the Sea, or of a navigable River, then to a Highway, for that the property thereof is to him whoſe ground is next adjoyning, and the uſe thereof is common to all men, and the power thereof the King hath by His Laws, *Proprietas Domino, uſus populo, poteſtas Regi*: wherein for more clear Illuſtration of this matter, I put this Caſe, That *I. S.* doth cut the Sea bank, or the bank of a great River

Proprietas Domo uſus populo. Poteſtas Regi.

River; and *I.B.* which hath occasion to pass thereby, falleth unawares into the cut, and is hurt in body or goods, the party which cutteth this Bank incureth these mulcts: For first, the owner of the soil may have his Action of Trespass, *quare solum fodit*, and he which fell therein may have his Action upon the Case against the digger of that cut, for to recover his damage for his special hurt; and the offendor may also be indicted at the Kings suit for the general wrong done to the Kings people: And the like Law is of highway.

8 E 4 9.
27 H.8. 27.
2 E.4.9.

A Wall doth differ in point of ownership from a Bank, first, in respect of the materials the same is made on, for a Bank is made *Ex solo & fundo qua ex sais propriis naturis sunt eadem cum terra super qua edificatur*, but so is not a Wall, for it is an artificial edifice, not of the materials arising of the place where it standeth, but which be brought thither and built there, *ad propria onera & costagia partis*; so that the ownership & property of a Wall doth appertain to him who is bound to repair the same, though his ground lye not next thereto; but of a Bank the property and ownership is his whose grounds adjoyn thereto: And this shall, I hope, suffice to have said of Banks and Walls, the two first defences nominated in the Commission of Sewers.

The letter of this Statute and Commission, seem to extend only to Banks, Walls, and other defences standing and being by the coasts of the sea and Marish grounds thereto adjoyning; but whether the Banks and Walls of fresh Rivers which have their courses to the sea be within this statute or not, hath heretofore bred some question; but for my own part, I am cleer of opinion that they be within the provision of these Laws, for there be two mischiefs recited in the Statute; the first is, for not maintaining the Walls and Banks against the sea, by reason whereof great hurt hath happened thereby, by the overflowing thereof: and the other, by the inundation of fresh water-courses through Land floods, which have done some damage to the grounds next adjoyning; and these Laws apply a remedy to both these

theſe grievances, that is, by repairing the Walls and Banks next the ſea, and by maintaining of the defences of the freſh Inland Rivers, to cauſe them keep their waters within their Channels. And I take it there be words in the Statute that will bear this conſtruction, *viz.* That by the rage of the ſea, flowing and reflowing, and by means of the Trenches of freſh waters deſcending, and having their courſes to the ſea, by divers ways be ſo dirupt, lacerate and broken, &c. And alſo in the preamble of the Statute the words there be, that by reaſon of the outragious flowing ſurges & courſe of the ſea in & upon Marſh grounds, and other low places heretofore through politique wiſdom won and made profitable for the great Common-wealth of this Realm, as alſo by occaſion of Lands, waters, and other outragious ſprings, in and upon Meadows, Paſtures and low grounds adjoyning to Rivers, Streams, and Currents, wherein the waters are to have their courſes. And what keeps the freſh waters within this Channel but good and ſerviceable Walls and Banks, and what things doth this Law intend to be dirupt, lacerate and broken, but the Walls, Banks and other defences which pent up their waters; and theſe words extend more properly to the Walls and Banks of freſh Inland Rivers then to ſea coaſts. And I do finde ſome ancient Authority in the point out of the Charter of *Romney* Marſh, *pag.* where the words be, *Ad diſtrictiones faciend' ad reparand' Wallia & watergaugia ejuſdem mariſci contra maris impetum inundationem aliarum aquar' dulcium*; which laſt words can have no other conſtruction or interpretation, but to extend the ſame to the Banks and and Walls of Navigable, and other freſh Rivers and watergauges of freſh ſtreams. And the Statute of 1 *H.* 4. *Cap.* 12. makes the ſcruple cleer wherein the words be, that the common paſſage of ſhips and boats in great Rivers of *England*, were oftentimes diſturbed by leaving of weres, &c. and provided a remedy therein; ſo hereby it is manifeſt that freſh Navigable ſtreams are within theſe Laws.

Romney Marſh.

1 H. 4. cap. 12.

Private

Private Walls and Banks.

BUt all Banks and Walls wherein waters be pent are not within the proviſion of theſe Laws, but only ſuch as belong to common and publique Rivers and ditches, Sewers and ſtreams: for Walls and Banks made and erected as fences to mens private grounds, and there ſet or made to ditches, gutters and ſtreams, for the drayning and watering of mens private grounds are not within theſe Laws, for theſe Laws take cogniſance and notice of none but of ſuch as tend to the good ſervice of the Common-wealth, and therefore whereas in the Ports of *Holland* in the county of *Lincoln*, and in other parts of this Realm, divers private perſons have for inning and ſafety of their Marſhes and Marſh grounds, caſt great banks for thoſe private uſes: theſe banks are not within the protection and defence of theſe Laws to be maintained; but I am of opinion, That they may be extirped if they be letting and a hinderance to the common good of the countrey where they be erected.

Foraſmuch as I am now in hand with Walls and Banks, the defences to Rivers, Sewers, Ditches and Gutters, I therefore take it, that it will hold good correſpondency here in this place, to treat of them and of their dependencies. A River therefore is a running Stream, pent in on either ſide with Walls and Banks, and beareth that name as well where the waters flow and reflow, as where the waters have their current one way, as is expreſſed in the Caſe of the Piſchary of the *Banne* in *Ireland*: In the Statute of 4 *H.* 7. *Cap.* 15. Thames is termed a River: In 34 *Lib. Aſſ. pl.* 11. and in *Plow. Com. fol.* 129. Tyne and Teſe be both named Rivers: and in 19 *H.* 7. *Cap.* 18. *Severn* is ſaid to be a River; *Trent*, *Humber*, *Boſton* Haven, *Lyn* Haven, and *Tyber*, *Orontes*, *Euphrates* and *Anſidies*, near which *Hanibal* the *Carthaginean* General ſtruck the Battel of *Canna*, be all of them in Hiſtories of great authority named Rivers.

4 H.7. 23 H.8

34 l. Aſſ. pl. 11

19 H 7.

Choppinus.

Rennatus Choppinus in his Treatiſe *de Dominio Franciæ*, *Lib.*

Lib. 1. *Tit.* 16. *de fluminibus*, ſaith, That *Fluminum duo ſunt genera Regalia quædam, alia Bannalia ſive privata, Regalia dicuntur ex quibus principes Jure patrimoniali vectigall capit in quibus modum & tempus piſcationis conſtituit:* and Sir *John Davies* in his *Iriſh Reports* in the ſaid Caſe of *Banne*, ſaith, *That ſo far as the Sea doth flow and reflow, it is a Royal Stream, and the fiſhings therein belong to the Crown; but where the ſame doth not flow and reflow*, Tertennants *of both ſides*, de Communi Jure, *have the Piſchary; yet a Subject may have the free fiſhing in the Royal ſtreams by cuſtom and preſcription:* And in the River of Thames *tam aquæ quam ſolum pertinuit Dom' Regi*, and by Charter they were conveyed to the Lord Major of *London*, and Citizens of the ſame. In *Lib. Intrac. fol.* 666. there is a preſident put in this maner, That an Action of Treſpaſs was brought *Quare le defend' piſcat' eſt in ſua ſeparali piſcharia & piſces inde, videlicet, duos Salmones cæpit*; the Defendant juſtified, and ſaid, That he was ſeized of the Mannor of *Dale*, which doth extend it ſelf *uſq; ad medium aquæ de* V. *quæ eſt eadem piſcharia in qua ſupponitur piſchationem predict' fieri exauſtriali parte*, and that the Plaintiff *eodem tempore quo, fuit ſeſitus de manerio de Sale quod ſe extendit uſq; ad medium fili aquæ predic' ex boreali parte ejuſdem aquæ & quod ipſe defendens & omnes quorum ſtatum ipſe habet in predic' manerio de Dale, à tempore quo non extat memoria hominum in contrario ſeiſit' fuerant de predic' auſtrali parte de predic' aquæ ut de ſeparali piſcharia ſua*: in which pleading it appears, That the Lords on either ſide the River, owe the River by ſeveral moyeties, and the ſeveral moyeties and the ſeveral parts of the fiſhing as incident thereto.

In veteri lib. Int. fol. 666.

It may alſo here, as I take it, be moved for an apt queſtion, In whom the property of running waters was; for in *Natura Brevium, fol.* 123. there is a *quod permitt' habere liberam piſchariam in aquæ ipſius* L. whereby it appears, That the Plaintiff had property in thoſe waters; and in *Plo. Com.* 154. one granted *aquam ſuam* in *L.* and the Piſchary paſſed thereby, and ſo did the ſoil alſo in my opinion: for in 12 *H.* 7. *fol.* 4. a *precipe quod reddat* is brought *de una*

Nat.br. fo. 123 *P.C.* 164.

12 *H.* 7. *fol.* 4.

acra

aere terra Cui aqua Cooperta. In my conceit the Civil Law makes prettier and neater distinctions of these then our Common Law doth; for there it is said, That *naturali ratione quadam sunt Communia ut Aer. Aqua profluens, mare & littora maris:* I concur in opinion with them, that the ayre is common to all; and I hold my former definitions touching the properties of the sea and the sea shores: But that there should be a property fixed in running waters, I cannot be drawn to that opinion; for the Civil Law saith further, *quod aqua profluens non manet in certo loco sed protinus fuit extra ditione in Ejus cujus flumen est ut ad mare tandem perveniat;* for in my opinion it should be strange that the Law of property should be fixed upon such uncertainties, as to be altered into *Meam, Tuam, Suam*, before these words can be spoken, and to be changed in every twinckling of an eye, and to be more uncertain in the proprietor, then a Camelion of his Colours. Our Common Law, which of all others is the most certain, did not set his property upon a Dear in Parks, Conneys or Hares in Warrens, nor on Fishes in running Streams; all which be more permanent then running waters be: And therefore I am of opinion, that taking this word *Aqua* for the bare running water, there can be no property therein, but as the same is incident to the soil, taking them two for one, it is drawn with the property thereof: and this difference is apparant by 12 *H.* 7. aforesaid; And Mr. *Lynwood* puts a difference *inter Fluvium & flumen*, for saith he, *Est perennis decursus aquar' sed flumen est propria ipsa aqua.*

Let it not be held Questionable, whether Rivers of both kindes be within these Laws or not, though they be not put among the defences which this Statute speaketh of; for that expresly those things which are termed Lets and Impediments, are commanded by this Statute to be removed out of the Rivers and Streams for hindring the waters; and Navigation being so carefully provided for cannot be supported, unless Rivers Navigable be maintained: and these Rivers are like the veins of a mans body, by means whereof the increase of the grounds near thereunto adjoyning are abundantly

dantly multiplyed, and the waters which trouble the Level are conveyed away thereby: ſo that I am clear of Opinion, that Rivers and their Channels, Waters and Banks, are all of them fully within the defence of theſe Laws, howſoever ſome which would have no new Rivers caſt by the power of theſe Laws, would extend the words but to the repairs, and not to the River it ſelf.

Sewer.

A Sewer, whereupon theſe Laws took their name, hath been no great ſtranger to our Common Laws of this Realm, being perfectly deſcribed, though not preciſely defined in our Law; ſome mincing the word, compound it of two words, *Sea* and *were*, ſaying, that *nomina ſunt conſonantia rebus*; and there is ſome coherence between the name and the nature of the thing. Authorities in Law will beſt decide the queſtion, and therefore 20 *H. 6. fol.* 1. an action of waſte is brought there againſt Tenant by the courteſie, for ſuffering a Sewer in part of the grounds to be unrepaired, by reaſon whereof his grounds in *L.* which the Defendent held by the courteſie of *England*, were ſorrounded; ſo that by this book it is made manifeſt, that the Sewer is a freſh water trench compaſſed in on both ſides with a bank, and is a ſmall current or little River. And in 12 *H.* 4. *fol.* 7. an Action of the Caſe was brought for ſtopping of a Sewer in *Dale*, by reaſon whereof the waters did overflow the banks, and drown the Plantiffs Meadow grounds: So theſe two Caſes ſufficiently declare what a Sewer is; and *Hollingſhead* in his *Chronicle* termeth the Fleet Dike in *London* a Sewer; and I am of opinion, That it is a diminutive of a River, and by expreſs words Sewers be within theſe Laws *& ſic eſt* in 39 *H.* 6. 31.

20 *H. 6. fol.* 1.

12 *H.* 4. *fol.* 7.

Gutter.

A Gutter is of a less size, and of a narrower passage and current then a Sewer is; and as I take it, a Gutter is the diminutive of a Sewer: and the difference between them is, That a Sewer is a common publike stream, and a Gutter is a straight private running water; and the use of a Sewer is common, and of a Gutter peculiar, and by expres words also a Gutter is within these Laws *& ceo est sic mention'* 39 *H.* 6. 31.

Ditches.

A Ditch *Fossa* is also described in our Books, as in 12 *H.* 4. 7. where an Action upon the Case was brought against the Mr. of S. *Marks* in *Bristol*, for that he was bound by the tenure of his Land to cleanse a Ditch there; he did neglect to do the same, by means whereof the waters therein were stopped, and did thereby surround the Plaintiffs grounds; so that hereby it is apparent, That a Ditch is a kinde of current of waters in *infimo gradu*. And Mr. *Cambden* in *Sua Lincolniensi Historia* doth there describe *Fosdyke* to be *Fossa incibis quam Henricus Primus per septem miliaria à Withania in Trentum perduxit ut Lincolniensibus ad subvehenda necessaria usui esset*; this Ditch is at this day a current and passage for Boats of small burthen in Winter, but in Summer none at all; though of late great sums of money hath been expended thereupon *Sed tamen ad huc nihil inde boni venit*: at the best it is the worst in all that countrey, and is of so slow a current *ut non videtur currere omnino:* It serves in many places for a fence to divide Lordships, and is a great trough to swallow up waters thereabouts, which otherwise would lie upon the Level, and of it I say no more, but *Spero meliora & expecto.*

Cambden.

Other famous Ditches there be, as that in the North-East part of the city of *York*, which is in a maner a standing Water: And there is an old forlorn Dike on the Fen sides

ſides in the county of *Lincoln*, called *Caredike*, more ancient then profitable, for it doth, as many other of thoſe unuſual Ditches do, run croſs to the ordinary currents of waters in thoſe parts: For where the Seas (for example) ſtand Eaſt from the main Land, and ſo the ordinary currents run all from Weſt to Eaſt directly towards the Sea, this runs North and South, obvious and croſs to the natural current of the waters, which is the true cauſe wherefore their currents be ſo ſlow, ſmall or none at all. There is another of them on *Newmarket* Heath *quæ admiranda Foſſa vocat* the Devils Dike: and in *Wiltſhire* there is a Ditch famous, called *Wanſdike*, or *Mercurii Foſſa*, which ſerves for a diviſion of countreys, and ſo be *Foſſa Limitania*, and are either altogether dry Dikes, and contain commonly no more waters then thoſe that fall into them: None of theſe Ditches be within theſe Laws, but ſuch of them which have a kinde of current, and which in ſome ſort partake with the Rivers.

Pools.

A Pool is a meer ſtanding water, without any current at all, and hath ſeldom or never any iſſue to convey away the waters; but a Ditch hath no conſtant ſtanding, nor any apparent current: A Pool is properly the Inheritance of ſome private, but a Foſſe or Ditch is in uſe common. Pools be not within this Law for two cauſes; the one, Becauſe both in property and uſe they be private and peculiar: The other is, Becauſe theſe Laws ſeem to extend to grounds caſually, and not continually drowned *& ad ea quæ frequentius accidunt Jura ad aptantur*; yet all Pools be not excluded from the helps of theſe Laws: for ſuch as adjoyn to great Rivers, and lie upon the ſides thereof without diviſion, they are in a maner part of the Rivers, and of their kinde is the two famous Pools called *Brayford* and *Swanpool*, both near unto the city of *Lincoln*.

Ponds.

A Pond is a ſtanding Ditch caſt by labor of mans hand in his private grounds for his private uſe, to ſerve his houſe and houſhold with neceſſary waters; but a Pool is a low plat of ground by nature, and is not caſt by mans hand. I finde a Pond within my Law I read on in *expreſsis terminis*, not as a thing defended thereby, but as a Let and Impediment: And had I not found him therein named, I ſhould not by any Expoſition have here brought it in amongſt the water Inſtruments; for I much marvel what impediment a Pond can be at all, unleſs by caſting of Trenches from the River to the ſame, it ſhall be a means to take thereinto ſome of the waters of the River, and may thereby hinder Navigation; but this is far fetcht.

Streams.

STreams be not any of theſe, for all theſe have their proper peculiar Banks, Bounds and Channels, and are put in amongſt them; but a Stream is properly a current of waters running over the Level at random, and be not kept in with Banks or Walls, and ſo *Linwood* ſaith, that *Flumen* which is a Stream *nihil aliud eſt quam ipſa aqua.*

Conduits.

A Conduit or ought thereto belonging is not within theſe Laws in any ſort, whether it pertain to a private perſon, or to a Town or Corporation.

Springs.

SPrings I finde within this Statute, but coupled with ſuch a word, that they thereby ſeem to be excluded and exiled quite from claiming any priviledge of defence by theſe Laws;

Laws; for the word (*Outragious*) being joyned therewith, doth ſignifie the meaning of theſe Laws to take them to be hurtful, and not helpful; but all this cometh of the word *Outragious*, which being but a quality annexed upon accident, may upon juſt occaſion be taken away. And the word *Springs* of it ſelf is both in appellation and operation, very beneficial for the Commonwealth: for I may juſtly term them the vital Spirits of many the great and Royal Rivers of this Kingdom, as of *Thames*, *Trent*, and ſuch like: And therefore I am willing to let ſuch of them as be not outragious and hurtful, to take up a place of defence within theſe Laws; for the Trent at the head is derived from Springs, as many other Rivers be: and I give both the eſſence and aſſiſtance to them, and ſo in my opinion they are worthy the protection of theſe Laws: and I doubt not but the waters iſſuing and guſhing from the outragious Springs, may by the provident & diſcreet care of the Commiſſioners be ſo ordered, as the ſame may be applyed & imployed to neceſſary uſes.

So now I have run through, like a ſwift ſtream, the qualities of theſe Rivers, Gutters, Sewers and Ditches, and of all their dependancies, and wherein they are to have aid and aſſiſtance of theſe Laws of Sewers, being in truth the very materials of theſe Laws: yet for a little better explanation of their ſeveral natures and kindes, I ſhall therefore put theſe Caſes;

1. First, If the Town of *A.* want water by the drineſs of the ſeaſon for the uſe of their cattel, or for other houſhould affairs, as for brewing, waſhing and ſuch like; and in the Town of *B.* which doth adjoyn thereto, there is plenty of waters, more perhaps then is neceſſary for uſe there, the Commiſſioners of Sewers have no power by any of theſe Laws, for any of the ſaid purpoſes, to make any order or decree to relieve the Town of *A.* with waters from *B.* for this Statute makes but two uſes of Rivers, Sewers and Streams, the one for draining, the other for ſailing; and being for neither of theſe purpoſes, the Commiſſioners have no power to deal therein.

But

2. But if two towns do adjoyn, and in either of them there is a River Navigable, and by accident one of them is dried up, and the other abounderh with waters, more perhaps then there is necessary use of; I am in the case of opinion, that the Commissioners of Sewers have power by the Commission to make a Law or Ordinance to relieve the River which wants waters, out of the abundance of waters which the other River hath, in help and supply of Navigation.

3. But put the case that *I. S.* keeps Boats for his own necessary uses and occasions, and for no other purpose, the Commissioners have no warrant by their Commission to relieve *I. S.* with waters for this his own private use, for that their power is the Republike; Yet if *I. S.* hath used with his Boats to carry and recarry for the common use of the people in general, then he is within the relief of these Laws.

4. The new Stream and cut which was now of late made and cast by Mr. *Middleton* from *Ware* to *London*, could not have been done by the power of these Laws, because it was not made for the draining or sailing, but for houshold affairs, and therefore special Statutes were enacted to begin, continue and perfect that work in 3, 4 *Fac. Regis*; and after the stream was effected, these two Statutes brought the same within the power of these Laws.

3, 4 *Fac. Reg.*

And now seeing my Law hath brought me in my argument and discourse among the things defended by these Laws, I shall now make a little digression from my Case, to treat of Bridges, and Calceys and Goats, the proper inventions and works of mens hands, and pertinent to this place to be treated of by the order of this Statute; and they be three material instruments which this Statute by name hath been careful to take order for.

Bridges.

Bridges.

BRidges are diverſly taken in theſe Statutes, for ſome are thereby to be maintained, and other ſome are to be extirped or reformed as lets and impediments; wherein I think it not amiſs for inſtruction, to open ſome other leading Statutes which have provided for them.

The firſt Statute of *Bridges* is in *Magna Charta, cap.* 15. *nulla villa nec liber homo diſtringatur facere pontes niſi qui ab antiquo & de jure facere conſueverant tempore Henrici Avi noſtri* this word (*facere*) is to be conſtrued in the ſence of *Reparare or Manutenere*, for other conſtruction it cannot have. And if this Statute ſhould be in force, I take it that it would abate much the power of the Commiſſioners of Sewers; for it ſeemeth by the letter of it, that either no Bridges were to be repaired, but ſuch as were made in the time of *H.* 2. and before; neither ſhould any be bound to repair them, but ſuch as in His time had then uſed, and were bound to repair them: but this Statute is neither repealed, nor muſt be abridged, as not to extend to Bridges made ſithence; and I take it, under favor, that it ſtands on furrounded grounds, which this Statute hath to do with; as alſo for ſuch Bridges as the Statute of 22 *H.* 8. *cap.* hath power over, which are Bridges ſtanding on High ways, for both theſe Statutes do in my Opinion oppoſe the ſaid Statute of *Magna Charta*: Howſoever Sir *Edward Cook* in his Caſes of the Iſle of *Ely* recites the ſaid Statute as it were in force at this day; and if ſo, then the expoſition muſt be made, as I take it, that all Bridges made and erected ſince are out of the inhibition of that Statute, or elſe that Statute is totally repealed: For otherwiſe all Bridges builded ſince ſhould not be repaired, becauſe no perſon or town ſhould be obliged to do them: And then were the power of Commiſſioners of Sewers almoſt altogether inhibited, touching Bridges, and their hands cloſed up for medling therewithal, but I take this Statute of Sewers in full ſtrength to deal with ſuch Bridges as come within the reach of it.

Magna Charta, cap. 15.

H. 2.

22 *H.* 8.

Caſe of the Iſle of *Ely.*

Bridges

Bridges within the Law of Sewers, are ſuch as lye on or near ſurrounded grounds, eſpecially if they be not only placed there for free paſſage, but alſo for ſtrength, to defend the violence of the waters, as many of this kinde be; *viz. London* Bridge, *Rocheſter* Bridge, the great Bridges at *Lincoln*, *Boſton* Bridge, and the like; and ſuch as lye on Inland and high countreys, over high ways, as *Burton*, *Trent*, *Ware*, *Wainsford*, *Huntington* and ſuch like, be within the ſaid Statute of 22 *H.* 8. and I make little doubt of it, but all the ſaid laſt mentioned Bridges are alſo within the proviſion of the ſaid Laws of Sewers, for they lie and are built over ſuch Rivers as be all of them within theſe Laws.

22 *H.* 8. The Statute of 22 *H.* 8. extends not to Bridges lying out of highways; but the Statute of Sewers doth extend to ſuch alſo: And therefore if a Bridge ſtand on a common Sewer, Ditch or Gutter which hath his current to the Sea, or to ſome River, the Commiſſioners of Sewers hath power over ſuch, either to repair the ſame, or to extirp it, as juſt cauſe and occaſion ſhall require.

Alſo private Bridges are within theſe Laws, as if *I. S.* and his Anceſtors, owners of ſuch a Houſe, have had and uſed to have a Bridge over a greater or leſs River to the Church, and to his Paſture Grounds, or to his Common, this Bridge, and all other of this kinde, are within this Statute of Sewers; *viz.* to be put down or reformed if they be impediments to the Commonwealth, and alſo to be maintained, if thereby the ſame be any material defence againſt the rage and violence of the waters, otherwiſe not, but for putting down ſuch Bridges which have been by preſcription. I hope the Commiſſioners of Sewers will be well adviſed therein, ſeeing time hath given great approbation of them, and therefore I ſhall handle this point more fully, when I come to treat of Lets and Impediments, where that part of this Statute comes moſt fit to be handled.

The Statute of 22 *H.* 8. extends to the repairing and amending

mending of Bridges onely, but if it be fit to take an Arch away, or to adde a new Arch thereto, or to erect and build a new Bridge where none was before, this is moſt fit to be done by the Commiſſioners of Sewers, whoſe power may be extended thereto.

All Bridges ſet upon Rivers by perſons without authority, may be pulled down by the Commiſſioners of Sewers, and the parties puniſhed; for no man ought of his own authority to be ſo bold with the common and high ways or ſtreams, as to erect Bridges or other Engines thereon without lawful Warrant.

Bridges in highways, where there is no ſtream under, but onely ſome petty Land ſtream at rain and wet ſeaſons, theſe be dry Bridges, and be not within this Statute of Sewers, but yet they be within the Statute of 22 *H.* 8. if they ſtand on highways: In 14 *Jacobi Regis* it was found by inquiſition taken at the city of *Lincoln* in the Guild-Hall there, before Sir *Thomas Grantham* Knight, and my ſelf, and other Commiſſioners of the Sewers, that the great Bridge at *Bracebridge* near the city of *Lincoln*, and ſtanding upon the River of *Wytham* thirty miles from the Sea, was fallen into great decay, whereby carts, carriages & men on horſe-back could not paſs over the ſame, as in times paſt had been uſed, in defect of *Hen. Sapcots* Eſq; who ought to repair a part thereof, by reaſon of his Mannor of *Bracebridge*; and of *Bartholmew Gregge*, who by reaſon of his houſe ſtanding at the Bridge foot, called the *Hermitage*, on the North ſide of the River, ought to repair another part; and of the Corporation of *Lincoln*, who was to repair a part thereof; and of the country of *Moreland*, who uſed to repair another part: And the ſame was decreed accordingly. But Mr. *Sapcot* without cauſe finding himſelf grieved thereat, preferred his Bill into the Exchequer Chamber againſt Sir *Thomas Grantham* and others, to be relieved therein; and did alleage, That the ſame ſtood far from the ſea, pretending thereby that the Commiſſioners of Sewers had no power to deal with the ſame: but at the hearing of the Cauſe in *Anno* 16. *Jac.* 14 *Jac.*

he was over-ruled in that and all other parts of this Suit.

A Calcey.

A Calcey or Calſway is a paſſage made by art of Earth, Gravel, Stones and ſuch like, on or over ſome high or Common way leading through ſurrounded grounds for the ſafe paſſage of the Kings liege people, and theſe Calceys have always been expreſſed in the ancient Commiſſions of the Sewers in the Regiſter, *Fitz. nat. bre.* and in the Statute of *6 H. 6. cap* 5. but not any Calceys be in theſe Laws, but ſuch as be over ſurrounded and low grounds, as that of *Barſton Bank*, *Southy Bank*, and ſuch like: but touching Calceys lying in Towns and Villages which be in the high uplandiſh Countries, this Law doth not in any ſort extend unto them, but all Calceys leading over the ſaid Bridges, and near unto them, are provided for by this Law; yet no private Calceys are to be dealt withal by the ſaid Commiſſioners.

Regiſter *F. H. N. B. 6. H. 6.*

Goats.

GOats be uſual Engines erected and built with Perculleſſes and doors of timber, ſtone or brick, invented firſt in *Lower Germany*, and after brought into *England*, and uſed here by imitation and experience, hath given ſo great approbation of them, as they are now, and that with good reaſon and cauſe inducing the ſame, accounted the moſt uſeful inſtruments for draining the waters out of the Land into the Sea: There is a twofold uſe made of them, the one when freſh waters flows and deſcends upon the low grounds where theſe Engines are always placed, and whereto all the channels where they ſtand have their currents and drains directed, the ſame is let out by theſe into ſome creek of the Sea; and if at ſome great floods the Seas break into the Lands, the ſalt water uſually have their returns

túrns through theſe back to the Sea: Many of theſe Goats which are placed on highways, ſerve alſo for Bridges. This Goat is no ſuch imaginary Engine as the Mills be which ſome rare wiſe men of late have invented, but this Invention is warranted by experience, the other is rejected as altogether chargeable and illuſory: Yet theſe Engines ſeems to me not to be very ancient here in this Kingdom, for that I do not finde them mentioned in any of the ancient Cõmiſſions granted, before this ſtatute did expreſs the ſame; and ſurely this Statute was ſo curious in the ſpecial repetition of ſuch defences *in ſpecie* as it intended to defend and maintain, that I am of Opinion, it can ſcarce be drawn to extend to any other: And therefore I do agree with the Opinion of Sir *Edward Cook* in his Caſe of the Iſle of *Ely*, that an artificial Mill, and ſuch like new invented Engines, are not to be erected by the power of theſe Laws, but being once erected and proved by experience to be beneficial to the publique State, they may be continued and maintained by the authority of this Statute.

New defences.

HItherto I have proceeded onely in the handling and diſcourſing of the old and ancient defences which be helpful both to Sea and Land: And therefore I am now deſirous to enter into the argument of new defences, being a matter very fit and apt to be diſputed on: And to give ſome warrant to my argument therein, I have ſo compoſed my Caſe, as both old and new be therein contained, wherein the point will be ſhortly this, Whether the new River and new Bank mentioned in my Caſe, could be ordered to be made by the power and authority of theſe Laws: And thoſe which would take a part to argue on the contrary, may alleage much matter, and many reaſons to make good their arguments; firſt, out of the words of the Law it ſelf, for thereby it ſeemeth, that this Statute can bear no ſuch expoſition by reaſon; the words thereof literally taken, ſeem to

extend onely to the old and ancient defences, and not to the erecting of new: And the words thereof in this point be theſe;

Foraſmuch as the Walls, Banks, Ditches, &c. by the rage of the Seas, and by the freſh waters deſcending, be ſo lacerate, diſrupt and broken, the Commiſſion therefore doth authoriſe the Earls of Lincoln, Rutland *and* Exeter; Robert *Lord* Willoughby *of* Grimſthrop, *Sir* William Welby, *Sir* Thomas Grantham, *and Sir* John Hatcher, *Knights, whereof three to be of the* Quorum, *to ſurvey and amend the ſaid Walls, and Banks, Ditches, &c. in all places neceſſary, and the ſame as oft as need ſhall be to make new*: Upon theſe words of the Statute, do thoſe which argue againſt the new Defences infer, That the Commiſſioners have not any power to cauſe new Banks, new Walls, or other defences to be erected; and ſo take a difference between the words *nova conſtruere, & de novo conſtruere*, the firſt extending to erect new ones where none were before, and the other purporting the erecting of a new one where before an old one ſtood: and the words which inforce this expoſition, be penned ſtrongly to that purpoſe; for firſt, they have power to repair and amend, What? ſuch Walls and Banks as were before, and the ſame to build new; which words, *The ſame*, literally taken, muſt needs extend to ſuch old fences as were before; and the conſtruction being ſo made, excludes clearly the power to make new ones where none was before: and this expoſition may be exampled in other
22 *H.* 6. Caſes of like quality, as in 22 *H.* 6. *fo.* 18. where it is ſaid, *That if Leſſee for years ſuffer a houſe to fall down, and before an Action of Waſte be brought againſt him, he buildeth another in the ſame place where the former ſtood, of the ſame quality and quantity, that ſhall excuſe him in the Action of Waſte*: but ſo would it not have done if he had builded the ſame in all points anſwerable in another place, for the one is renewed,
10 *H.* 7. *fol.* 18. the other a new one: and in the 10 *H.* 7. *fol.* 18. in the Abbot of *Thorntons* Caſe, the words in a Leaſe were, *That the Leſſee ſhould repair a Chappel leaſed to him, and the ſame*

de

de novo conſtruere & conſtructam curare, which words there bear the ſame ſence in expoſition: And the Statute of *Magna Charta cap.* 16. ſeemeth, touching Banks, to ſway the ſame way; for there the Statute is, *Quod nullæ reparie defendantur niſi illæ quæ fuerunt in defenſo tempore Henrici Regis avi noſtri & per eoſdem locos & eoſdem terminos ſicut eſſe conſueverunt tempore ſuo*; this makes much againſt erecting of new Banks, if it be in force: for if no perſon ſhould be bound to repair ſuch as were built ſince that time, then were it vain to build new ones. Sir *Edward Cook* in his Caſe of the Iſle of *Ely*, is ſtrongly of the ſame opinion, *That no new River ſhould be made and caſt by the power of this Commiſſion*; for the caſe there is, *That the Commiſſioners of Sewers in thoſe parts made an order and decree, That a new River ſhould be cut out of the old River there called* Owſe, *through the main Land ſeven Miles unto another part of the ſaid River*: And the queſtion there was, Whether the Commiſſioners of Sewers had any ſuch power or not? and he there delivered his opinion expreſly, That they had not; and affirms it, *That it was dangerous and incovenient that Commiſſioners of Sewers ſhould have any ſuch Power and Authority, for then they might thereby ſtop up the Havens, which are the Ports of the Realm*: And for the juſtifying of this opinion therein, he alleageth *Fitzher. Na. Bre. fol.* 225. and the *Regiſter, fol.* 252. that in caſe where a new River or Stream was deſired to be made, the Writ of *Ad quod damn'* was to be awarded, which ſhould firſt be directed to the Eſcheator of that county, to the end he muſt enquire and certifie what damage it might be if ſuch a cut ſhould be made, or a new Trench caſt; and ſo concluded directly againſt the making of new Rivers and drains by the Commiſſioners of Sewers. And truly there is one thing more which makes ſtrong on that ſide, which is, That a new River, drain or cut, cannot be made but through ſome mans private Inheritance, and to the prejudice thereof, which is a matter very conſiderable: So that all theſe things laid together, might very well move Sir *Edward Cook* to be of the ſaid opinion, That

Magna Charta Cap. 16.

Caſe of the Iſle of *Ely*.

Fitz. Na. 13. *Fol.* 225. *Regiſt.* 252.

no

no ſuch new River or drain could be made by the Commiſſioners of Sewers by the power of theſe Laws.

Argumentum in contrarium.

The reaſons and authorities put on the other part are weighty and ponderous, and require a very good anſwer; which I ſhall endeavor to give thereto: It is true, that the words of this Statute and Commiſſion bear much with the ſaid former expoſition; So I hope to finde words in this Statute alſo, which will tend as much the other way: And they be in the fore-part thereof, *viz.* That daily conſidering the great damages and loſſes which have happened in many and divers parts of this Realm, as well by the contagious flowing ſurges and courſe of the ſea, in and upon Marſh grounds, and other low places heretofore through politique wiſdom won and made profitable for the Commonwealth of this Realm, &c. And theſe grounds which have been ſo won, could not be ſo kept and preſerved, but by banking and new fencing in; which proves directly, that the ſaid new Banks and new fencing might be made for the inning and keeping of the ſaid new won grounds: And alſo the Statute of *6 Hen. 6. Cap. 5.* gave the Commiſſioners of Sewers power to repair the ancient Banks, and Walls and fences *& eadem, & alia de novo conſtruere*; by which words the Commiſſioners which had their power from that Statute, might make new defences, as Banks, Walls and ſuch like: And ſo is the opinion of Sir *Edward Cook* delivered upon the ſaid Statute of *H. 6.* in his Caſe of the Iſle of *Ely*, which being obſerved and granted, makes ſtrongly for this part; for that the Statute of 23 *H.* 8. doth not only confirm all former Statutes of the Sewers then in *Eſſe*, but alſo gives authority to the Commiſſioners to do after the Tenure and effect of all and ſingular the Statutes and Ordinances before that time made: And although the ſaid Statute of *H. 6.* was in time then expired, yet the form and effect of it may be followed and obſerved: And to that end I take this diverſity between a Law repealed and a Law expired, for a repealed Law is made void and fruſtrate, as either unworthy

The Law it ſelf in words extend to it.

The expired Law of *H. 6.* giveth aid to this expoſition.

or

or unneceſſary for ſome reſpects to be any longer continued or put in execution, and therefore was forbidden to be uſed or practiſed; but a Law expired in time, though it hath loſt his vigor and force, yet it is like a vertuous man deceaſed, his life and actions may be worthy imitation, though the date of days be at an end; but a Law repealed is like a man condemned for ſome offence, whoſe life and actions are neither of them worthy imitaion, unleſs it be to do the contrary: And the ſaid Statute of *H. 6.* was a worthy Law, which this Statute intended not to come ſhort on, but to extend further then the Limits of that Law did reach unto: alſo the ſaid Statute of *H. 6.* is uſed by Sir *Edward Cook* in the pleading of *Rooks* Caſe in his 15. Rep. where he could make there no other uſe of it, ſeeing it was in time expired, then only by way of imitation. *Rooks* Caſe.

Alſo we muſt conceive, that theſe Laws of Sewers are of great and urgent neceſſity and uſe for the good of the whole Commonwealth of the Realm, and therefore the intent thereof maybe extended in expoſition beyond the letter of the words; for the words be (*and the ſame to make new*) which according to the bare words in a literal conſtruction, cannot extend to new ones where none was before, but to the re-edifying of the decayed old ones; but the learned expoſitor, whoſe conſtructions be not ſo much grounded upon the letter as upon the ſence, may in equal juſtice extend the ſence to new making, as wel as to renewing of defences; for Mr. *Bract. li. 1. Cap. 3.* defineth equity to be *Rerum convenientia quæ in paribus cauſis paria deſiderat jura & omnia bene coequiperat & dicitur equitas quaſi equalitas*: And if the grave and learned Judges have in private affairs introduced this equity to direct, inlarge or diminiſh the letter of the Laws in the ſence of conſtruction, as by many preſidents we finde in Mr. *Plow. Com.* in *Hill* and *Granges* Caſe, *fol.* 178. and in many other authorities *à fortiori* ſhall this Statute of 23 *H.* 8. be expounded with as much favorable equity as can be, to inlarge the letter of the Law in the ſence of conſtruction, becauſe it tends ſo much to the advancement of the Commonwealth, The equity of this Law will help this expoſition. *Bracton.* *Hill & Granges* Caſe.

Et

Et qui heret in littera heret in cortice. And if the makers of the Law, when this Statute was put into the frame, had been demanded, whether their meaning was to have it extended to the making of theſe new defences where either juſt occaſion or neceſſity did inforce it; they would have anſwered, That they ſo intended it; for the ſoul and life of the Law lieth in the ſenſible expoſition thereof, and not in the bare letter, as Mr. *Plow.* alſo fully demonſtrates in his *Com.* in *Eaſton* and *Studs* Caſe.

And whereas it is formerly alleaged, that the warineſs of the Common Law was ſuch in theſe Caſes, that it admitted not one ſuch new Trench, River or new cut to be made, without the awarding out of the writ of *Ad quod dam'* directed to the Eſcheator, an Officer ſworn to enquire, firſt, what damage it might be if ſuch a new cut or drain were made? and then upon his inquiſition returned, there might be one made, if by the inquiſition it were found convenient, elſe not to be proceeded further in: But in anſwer thereto, being the argument ſet down in the ſaid Caſe of the Iſle of *Ely*, I am of Opinion, That there may be more wary and circumſpect proceedings by this Commiſſion, then in the *Ad quod damn'* by the Eſcheator; for there be many Commiſſioners which be all ſworn, and in the *Ad quod damn'* there is but one, the Eſcheator, *plus vident oculi quam oculus & tutius eſt rem committere pluribus, quam uni*, and in my Opinion, it is much better to commit this weighty buſineſs to many Commiſſioners of great gravity, experince, learning, wiſdom and integrity, then to one Eſcheator, who may perhaps want all thoſe vertues: And further, whereas in the ſaid Caſe of the Iſle of *Ely*, it is inferred, or rather feared, that by giving this power to the Commiſſioners of Sewers, they may thereby ſtop up the havens of this Kingdom; that fear is needles, for I finde, that neither by the letter nor the ſence of theſe Laws, any ſuch expoſition can be made, either to the ſtopping up or hindring of their currents and paſſages. But to proceed in my former diſcourſe in making new defences: I know that in the 43,

and

and 44 *Eliz.* a great controverſie did ariſe in the county of *Lincoln*, about the building and erecting of two new Goats at *Skirbeck* and *Langrate*, for the draining of the waters out of South *Holland* Fens into *Boſton* Haven; which work Sir *Edward Dymock* Knight, did further what he might, by the ſtrength of himſelf and his friends; and it was oppoſed by the Countrey of *Keſteven*: and the very exception thereto taken, was, That the Commiſſioners of Sewers could not by the power of their Commiſſion make a Law for the erecting of theſe new Goats where never any ſtood there before: And that Caſe proceeded ſo far, as the ſame came in the end before the two chief Juſtices, *Popham* and *Anderſon*, who both delivered their opinions, that the ſaid new Goats, if they were found to be profitable for the good and ſafety of the county, might be erected by the power of this Statute; but they then wiſhed and adviſed, that the Commiſſioners ſhould be wary, provident and circumſpect to adviſe deliberately before hand, that they by the opinion of experienced perſons in thoſe affairs, the ſaid new works ſhould in all appearance ſeem to be profitable to the Commonweal, if they were effected; & that Commiſſioners ſhould not in any ſort make ſuch devices at the ſuit, proſecution and requeſt of private perſons for their private & peculiar good, who many times ſought their own ends under pretence of the publike good. And a like great controverſie did ariſe in 12 *Jac.* in the counties of *Cambridge*, *Huntington* and *Northampton*, about the making of new cuts and drains in the Iſle of *Ely* by the power of the Commiſſioners of Sewers, which being much oppoſed, the ſame came in the end to be heard before the King and Councel, wherein this Order was conceived as followeth. 43 & 44 *Eliz.*

The Kings Councels Order.

HIs Majeſties Attorney-General having according to an Order of this Board of the Thirteenth of *October* laſt, called unto him the

Kings learned Councel; and taking Information of such Complaints as were first exhibited unto this Board, touching sundry Suits and Vexations moved of late by certain obstinate and ill-disposed persons, against His Majesties Commissioners of Sewers, for the counties of *Lincoln*, *Huntington*, *Northampton* and *Cambridge*, and their Officers and Ministers, for executing the Orders and Decrees of the Commissioners, to the manifest destruction and inundations of many large Levels and parts of the said counties: And having by their Lordships like Directions, upon advised consideration, weighed and compared the said late and undue proceeding with ancient Laws of this Realm, appearing in divers notable Records in the point now questioned, with the continual and concurrent practise of ancient and later times; and also the Opinions of the Lord *Popham*, late Chief Justice, delivered in writing very exactly and fully upon the said Questions, touching the Power and Authority of the said Commission; and thereupon making Report at large unto their Lordships this day in full Counsel, of the whole state of the cause; Forasmuch as thereby it appeared, That these Inventions and Disturbances consist upon Four heads, wherein the extent of the Commission was questioned, upon pretext and conceit of Law: First, that the Commissioners of Sewers had not Authority to cause new Banks, Drains or Sluces

Sluces to be made where there had not been any before. Secondly, that they might not lay the Tax or Rate upon Hundreds, Towns or Inhabitants thereof in general, but upon the firſt Preſentment or Judgement to charge every man in particular, according to the quantity of his Land or Common. Thirdly, that they had not power ſufficient to commit to priſon perſons refractory and diſobedient to their Orders, Warrants and Decrees. And laſtly, that Actions of Treſpaſs, Falſe Impriſonment, and other Proces at the Common Law, have been brought againſt ſome of their Officers and Miniſters for executing their Decrees and Warrants; Their Lordſhips finding in their wiſdoms, that it can neither ſtand with Law, nor with common Senſe or Reaſon, that in a cauſe of ſo great conſequent the Law can be ſo void of Providence, as to reſtrain the Commiſsioners of Sewers from making new works to reſtrain the fury of the Waters, aſwel as to repair the old where neceſsity doth require it for the ſafety of the country, or to cauſe a charge upon the Towns or Hundreds in general that are intereſſed in the benefit or loſs, without attending particular Survey or Admeaſurement of Acres, when the ſervice is to have ſpeedy and ſudden execution, or that a Commiſsion of ſo high a nature, and of ſo great uſe to the Commonwealth, and evident neceſsity, and of ſo ancient juriſdiction, both before

the Statute and since, should want means of coertion for obedience to their Orders, Warrants and Decrees, when as the performance of them, the preservation of many Thousands of His MAJESTIES Subjects Lives, Goods and Lands doth depend; It plainly appearing, That it will be a direct frustrating and overthrow of the authority of the said Commission of Sewers, if the Commissioners, their Officers and Ministers should be subject to every Suit at the pleasure of the Delinquent in His Majesties Court of the Common Law, and so to weary and discourage all men from doing their duties in that behalf: For the Reason aforesaid, and for the supreme Reason above all reasons, which is the salvation of the Kings Land and People, Their Lordships did Order, That the persons formerly Committed by this Board for their contempt concerning this cause, shall stand Committed until they release or sufficiently discharge such Actions, Suits and Demands as they have brought at the Common Law against the Commissioners of Sewers, or any the Ministers or Officers of the said Commission; saving unto them nevertheless any Complaint or Suit for any Oppression or Grievance before the Court of Sewers, or this Table, if they receive not Justice at the Commissioners hands. And their Lordships further Order, That Letters from the Table shall be written to the Commissioners

of

of Decrees of like nature, when it ſhould be found needful, requiring, incouraging and warranting them to proceed in the execution of their ſeveral Commiſsions, according unto former practiſe and uſurage, Any late diſturbance, oppoſition or conceit of Law whereupon the ſaid diſturbance hath been grounded notwithſtanding; with admonition nevertheleſs, That care be taken that there be no juſt cauſe of complaint given by any abuſe of the ſaid Commiſsion.

Examinat' per Edmunds Cleric' Conſilii.

Preſent at this Order making, were,

1. The Kings Majeſty in Perſon.
2. The Archbiſhop of *Canterbury*.
3. L. Chancelor *Elſmeare*.
4. L. Treaſurer Earl of *Suffolk*.
5. L. *Steward* D. *de Lenox*.
6. L. Admiral *Howard* Earl of *Notingham*.
7. L. Chamberlain Earl of *Pembroke*.
8. E. of *Arundel*, *Howard*.
9. Viſcount *Wallingford*.
10. Viſcount *Fenton*.
11. *Andrews* Biſhop of *Ely*.
12. Lord *Watton*.
13. Lord *Cary*.
14. Secretary *Winwood*.
15. Secretary *Lake*.
16. Sir *Foulk Grevil* Chancelor of the Exchequer.
17. Maſter of the Rolls *Ceſar*.
18. Sir *Francis Bacon* Attorney-General.

All of them of the Privy-Councel.

This Order is in ſome points legal, and may ſtand for a direction in matters of Law, and the other parts thereof may

may ſtand for a preſident of State; and it thereby plainly appeareth, that the Kings learned Counſel were of Opinion, That the ſaid new works might be Ordered and Decreed to be done by the Commiſſioners of Sewers, and that the ſame had warrant from former preſidents.

But the laſt allegation on the contrary party is very forcible againſt this argument, That by the making and erecting of theſe new Defences, the inheritance of private perſons are thereby prejudiced whereon they be built; yet as *Cato* ſaith, *Vix ulla Lex fieri poteſt quæ omnibus utilis ſit ſed ſi majori parti proficiat ſufficit*; and therefore this Objection I thus Anſwer, That theſe new works are not to be undertaken but upon urgent neceſſity in defence of the countrey, or for the ſafety thereof, ſo that the Commonwealth be therein deeply intereſſed and ingaged; and things which concern the Commonweal are of greater accompt in the Law, then the intereſt of private perſons.

Cato.

13. *H.* 8. And ſo it is 13 *H.* 8. *fol.* 16. That the Commonwealth ſhall be preferred before the private Eſtate, and for the good of the Commonwealth a private perſon ſhall receive damage, if otherwiſe it cannot be eſchewed; as a private mans houſe ſhall be pulled down, if the next houſe thereto be on fire to ſave the Town; and the Suburbs of a City may be pulled down in time of War, to ſave the City; and Bulwarks may be raiſed on private mens grounds for defence of the Realm: And what greater enemy can there be then the Sea, who threatens with his mercileſs waves to ſwallow up all before it, but that the hand of the Almighty hath tied and bound him in the fetters of his eternal decree, and given policy and means to man to keep him from invading the Land by artificial works, proper for ſuch ſervices: Therefore in my Opinion, by the very true intent and meaning of the ſaid Statute, and by a juſt, equal and reaſonable conſtruction, it ſhould lie in the power of the Commiſſioners of Sewers, upon juſt and urgent occaſions and conſiderations, to make Orders and Decrees for erecting and making of new Banks, new Walls, Goats, Streams, Sluces, and other

Pro ch. 8. *ver.* 27.

other neceſſary Defences againſt the overflowing of the Sea; For *Ubi nova ſit maris incurſio ibi novum eſt apponendum remedium*, with this caution, That under the pretence of the Commonweal a private mans welfare be not intended to the charge, trouble and burthen of the countrey: And with this alſo, That where any mans particular intereſt and inheritance is prejudiced for the Commonwealths cauſe, by any ſuch new erected works, That that part of the countrey be ordered to recompence the ſame which have good thereby, according as is wiſely and diſcreetly Ordered by two ſeveral Statutes, the one made in *Anno* 27 *Eliz. cap.* 22. *Raſtal* Havens and Rivers, is where the Commiſſioners have power to compound and agree with the Lords and owners of the grounds through which the new cuts are to be made; And the other 3 *Jac. Reg. cap.* for bringing the new ſtream to *London*: and although theſe Statutes hold not in the general Caſes of Sewers, but are applied to the ſaid particular matters therein expreſſed, yet they may ſerve as good Rules to direct our Commiſſioners to imitate upon like occaſion happening. 27 *El.* c. 22. 3 *Jac.*

The ſecond Point upon this Statute.

It appeareth by my Caſe, That the Commiſſioners of Sewers did decree a new Bank to be raiſed, and a new River to be caſt, and an old Sewer to be repaired upon their view, ſurvey and diſcretion. The words of this Commiſſion upon which I framed this part of the Caſe be theſe (*videlicet*) *We have aſſigned you* Theophilus *Earl of* Lincoln, Robert *Lord* Willoughby *of Earsby*, *Sir* George Manners *Knight*, *Sir* Philip Tyrwhit, *and Sir* John Wray, *Knights and Baronets*, *Sir* William Pelham, *Sir* John Read, *Sir* Edward Aſcough, *Sir* Hamond *Knights*, Anthony Erby *Eſq*; Quor'; *the ſaid Earl, Lord, and Sir* George Manners, *we will to be three to ſurvey the Walls, Banks, Drains, Sewers, &c. and the ſame to cauſe to be repaired, amended or put down as cauſe ſhall require, after your wiſdom and diſcretions, and to do after our Statutes; as alſo to inquire by the oathes of lawful and honeſt men of thoſe places where ſuch default be.* By the Tenor of which words I conceive, That Commiſſioners

ners of Sewers have power by their Commiſſion to proceed three maner of ways; (*viz.*) firſt, By Survey: 2. By Jury: 3. By diſcretion; wherein it behoveth Commiſsioners of Sewers to know perfectly, how to uſe and diſpoſe of their powers with due underſtanding of theſe parts of this Commiſſion and Law: And the better to prepare them herein, I ſhall take ſome pains to declare unto them what they may do by ſurvey without a Jury, and what by Jury, and what by their diſcretion, without both Survey and Jury.

View and Survey.

VIew is the primary part of Survey, and Survey is much, but not altogether directed by view. It is true, that view is of great uſe in the Common Law, and it is to be done and performed in perſon, and ſuch views are taken in Tryals of Aſſizes; yet by the 36 *Hen.* 8. in *Dyer fol.* 61. a very perſonal view needeth not in an Aſſize, if upon examination of the Jurors it may appear, that a competent number of them know the grounds in queſtion, in ſuch ſort as they can put the party in poſſeſſion if he recover; but in an Action of Waſte, an expreſs perſonal view is both required and requiſite, for the words of that Writ directs the Sheriff *Accedere ad locum vaſtatum*; In a word, there is a diverſity between a view and a ſurvey, for by the view one is to take notice only by the eye, but to ſurvey is not only to take notice of a thing by the eye, but alſo by uſing other ceremonies and circumſtances, as the hand to meaſure, and the foot to pace the diſtances.

Penningtons Caſe.

And the Commiſſioners Surveyors have power to take information by examination of others: And although Judge *Fitz.* in 27 *H.* 8. *fol.* 27. holds a Surveyor of very ſmall eſteem in his power and authority, that is, That he may hear, ſee and ſay nothing *Oier voier & rien dier*: Yet under the favor of that book, I take a Surveyor to be of more eſteem and authority; for by an old Statute made

in

in 4 *Edw.* 1. *stat.* of Surveyors, first, he is there described to be a man which is to view the work, and to make inquiry, and to see down which be Copyholds, which be Freeholds, &c. whereby it appeareth, that a Surveyor is an actor, and not a looker on, as Mr. *Fitzherbert* would have him; so by these descriptions the Commissioners may inform themselves what is meant by the word *Survey*, put in the Statute: And many of our Statutes take notice of such an Officer as a Surveyor; For in the Statute of Bridges and highways, there be such Officers appointed; and in the Statute made for the erection of the Court of Wards and Liveries, there is a grave Officer appointed, who is called the Surveyor general of that Court, and he is a Judge in matters there handled. 4 E. 1.

And there is also an Officer in this Statute of Sewers, called a Surveyor, who hath no judicial power, but is meerly an Officer.

What things Officers of Sewers may do by Survey onely.

EVery thing which Commissioners of Sewers are to do, must be by the true understanding of their authorities; and this must be so done, that they make such distinctions, differences and applications as may stand with knowledge, skil and learning; or otherwise their proceedings will prove irregular: And therefore it is not only meet to describe the Officer Surveyor as formerly I have done, but also his Office, which I now mean to do.

First, Commissioners of Sewers may view the Defences, and thereby may inform themselves which stands in need of repairing and amending, and which not; and wherein the defaults and defects appear to be, and what they be. 1.

Secondly, they may by survey take notice and knowledge, by conference with Carpenters, Masons, Smiths and other Officers, what things are fitting to be provided for effecting the works, and what sums of money will be spent for the finishing thereof. 2.

3. Thirdly, the Commissioners may by view and survey, take knowledge of the lets, impediments and annoyances in the Banks, Walls, Rivers, Streams, Gutters, Sewers, and of the height and lowness of the said Banks and Walls; and may thereby discover and finde out the wants, imperfections, weakness and strength of them, and so may cause the lets and impediments to be removed, and the wants to be supplied, and the weak places strengthned, as cause shall require.

4. Fourthly, also by survey onely they may sufficiently inform themselves of the incroachment, and of the straitness, depth, wideness and shallowness of the Rivers, Streams, Gutters and Sewers, and may view the defects in these kindes.

These things I have produced as proper to be performed by view and survey of the Commissioners; and now I shall proceed to the rest.

Things to be done by a Jury.

1. FIrst, what person or persons did erect and set up any let and impediments, as a Floodgate, Mill-dam or such like, must be found by Jury; for here the words of the Statute are to be observed, which are these, *And also to inquire by the oathes of good and lawful men of the said shire or shires, place or places, where such defaults or annoyances be, as well within liberties as without, by whom the truth may rather be known through whose default the said hurts and damages have happened, or who hath, or holdeth any Lands or Tenements, or Common of pasture, or profit of fishing, or hath or may have any hurt, loss or disadvantage by any maner of means in the said places, as well near to the said Dangers, Lets or Impediments, as inhabit or dwell thereabouts, by the said Walls, Ditches, &c.* So that the first Article is full within the words of this Statute; and therefore it must be done by Jury, and no other accusation is of sufficient strength in the Law to put a man to his answer. And herein the makers of these Laws did sagely, for how should Com-

Commiſſioners of Sewers take notice by view or ſurvey of ſuch things as are done or commited in their abſence?

Secondly, if any Wall, Bank, River, Sewer, or other defence be defective by neglect or ſufferance of ſuch as ſhould repair the ſame, the Commiſſioners of Sewers are to inquire by Jury in whoſe default the ſame happened. 2.

Thirdly, the Commiſſioners are to enquire, What perſon or perſons ought or be bound by Cuſtom, Preſcription, Tenure, Covenant or otherwiſe; or for or by reaſon of what lands or grounds he or they be tyed or bound to do the repairs, and where thoſe grounds do lye, and who be the owners thereof? 3.

Fourthly, alſo it muſt be inquired by Jury, What grounds lye within the hurt or danger of waters, either within the ſurrounder by the ſea, or the inundation of the freſh waters, and to whom they do belong? 4.

Fifthly, and if a new Sluce, Goat or other defence is to be erected, built and made, or a new Sewer, Gutter or Trench to be caſt, this may be determined of by the view and ſurvey of the Commiſſioners, and ſo may the aptneſs of the places where they are to be ſet or caſt, and the length, height, bredth and depth of them; for theſe things are proper for a view and ſurvey: But what perſons hold Lands and Tenements within the Level, which are fit to be chargeable thereunto, and the quantity of their Lands are to be inquired of by Jury. And theſe few cauſes I have put for example ſake: and if any other fall out within the like reaſon, then they are to receive the ſame conſtruction. 5.

Sixthly, in every caſe where an Amerciament is to be impoſed, it muſt be by preſentment of good and lawful men upon their Oaths, *Et hoc per ſtatutum de Magna Charta*, cap. 14. *nulla miſerecord' ponatur niſi per Sacramentum proborum & legalium hominum de viceneto, &c.* 6.

Surveyors presentment.

BUt it hath been used, that Surveyors of the Sewers have made presentments of defaults of things governed by these Laws; but whether such a presentment be binding or not, is a good point. It is clear in my opinion, that they can make no presentment, but such as happeneth within their view and survey, and what those things be they formerly appeared. They cannot present that *I. S.* is bound by prescription, custom, covenant or otherwise, to repair such a Wall, Bank or Sewer, for this is not within their Office. In *Kelloways Reports fol.* 141. there is a custom alleaged, that two men within the provost might present the Articles of the Leet; But I doubt of such Presentment, though it have a custom to strengthen it: I take this difference, that an Original Presentment Surveyors cannot make, as to present *I. S.* that by the Tenure of his Lands he ought to repair such a Bridge, Wall, Bank or other Defence; But the Surveyors may make a supplemental Presentment; as for example, if it hath been presented before by a Jury, that *I. S.* ought to have repaired such a Ditch, and hath not done the same, and day is given him by the Commissioners of Sewers to do the same, if the same be not repaired at the day, the Surveyor may present in this case the not repairing, because this is but an Oath of assistance, *ad informandum conscientiam Judicis*, for the Amerciament shall be imposed by the force of the said former Presentment; and this latter Presentment by the Surveyors, is onely to give the Justices notice of the parties farther neglect, to the end they may impose the greater Amerciament: And a Presentment by Surveyors is not traversable, being of so smal esteem in Law, as our Law will not vouchsafe to take an issue upon it, for their act herein is not in the ordinary legal form.

Kelloways Rep. fol. 141.

What

What Commissioners of Sewers may do by Discretion.

DIscretion is the herb of grace that I could wish every Commissioner of Sewers well stored withal, for the makers of this Statute had an intention to make it of great use, being literally nominated nine or ten times in this Law, & for this cause I have inserted in my Case; but note, that the word *Wisdom* is coupled with it, and the word (*Good*) is annexed to them both, as best shewing of what pure mettal they should be made of, *After your good wisdom and discretion.*

There be three several degrees of discretion, *Discretio generalis, Discretio legalis, Discretio specialis.*

Discretio generalis is required of every one in every thing that he is to do or attempt. 1.

Legalis discretio is that which Sir *Edward Cook* meaneth and setteth forth in *Rooks* and *Keighlies* Cases, *Hoc est scire pro legem quod sit justum*; and this is meerly to administer Iustice according to the prescribed rules of the Law; and herein is this discretion limited, that it go not beyond or besides those Laws which are to be executed: And this discretion is to be governed by the Laws, for *Cicero* saith, *Sapientis est judicis cogitare tantum sibi esse permissum quantum sit Commissum aut creditum.* 2. *Cicero.*

The third discretion is where the Laws have given no certain rule to be directed by in a case within the power of this Commission, there the Commissioners are to order these affairs with such wisdom and judgement, that although their censure be not framed in a Rule of Law, yet they are to do therein *secundum æquum & bonum*; and herein discretion is the absolute Iudge of the Cause, and gives the rule: But in the case of Legal discretion, there discretion is but a servant, and is tyed to attend upon the Law; and there the Law directs the censure, and discretion is but to do the same wisely & temporally; for *ipsæ etenim leges cupiunt ut jure regantur.* Sir *Ed. Cook* in *Rook* Case 5 *Report*, gives this rule to the 3. *Cato.*

Com-

Commissioners, *That although the words of the Commission be, That they should do according to their discretions, yet their proceedings ought to be limited and bounded within the Rules of Law and Reason; for that discretion is a Science to discern betwixt falsity and truth, between right and wrong, between shadows and substance, betwixt equity and colourable glosses, and the Commissioners ought not to follow their wills and private affections*; for, That *talis discretio discretionem confundit*: And therefore now I will declare in few words, in what things these Commissioners are to be ruled by good discretion.

1. First, the quantity of Fines be left to the discretion of the Commissioners.

2. *Item*, Imprisonment of the bodies of the offenders when they deserve, and the time how long, lieth much in their discretion.

3. *Item*, it lieth in their grave wisdoms and discretions, when and where to erect new Walls, Banks and other Defences, and what sums of Money to Raise and Levy therefore.

4. The election of Officers lieth in their discretion.

5. It lieth many times in their discretion whom to fine, and whom to imprison.

6. I take it this word *Discretion* used in the Statute, giveth power to the Commissioners to order businesses there arising in course of equity, for *hoc nihil aliud est*, but to proceed *secundum æquum & bonum*.

I have put these few Cases as examples to direct and instruct what may be done by discretion, omitting many other, because I had rather trust to the worst certain Law, then to give too much way to the uncertain discretion of the Commissioners, according to the old saying, *Quoad fieri possit quàm plurima legibus ipsis definiantur quam paucissima vero judicis arbitrio relinquantur*; and herein I suppose I have made good my word in this, that I have proved by my Argument, That the said new Bank and new River might well be decreed by the view and survey of the Commissioners, and by their good discretion, and

Aristotle Ret.

so

ſo might the ſaid old Sewer be repaired; and therefore theſe being ended, I will now proceed to the handling of the reſt remaining.

My former labor hath been to expound and declare what defences, as well againſt the overflowing of the ſea, as againſt the inundation of freſh waters, were and be to be maintained, and alſo new erected by the Tenor and power of theſe Laws: So that now it comes very aptly to be handled, for what cauſes, conſiderations and matters one ſhall or may be tyed to the repairing and keeping thereof, which I take to be theſe nine ſeveral ways.

1. By Frontage. 2. By Ownerſhip. 3. By Preſcription. 4. By Cuſtome. 5. By Tenure. 6. By Covenant. 7. *Per uſum rei.* 8. A Townſhip. 9. By theſe Laws of Sewers.

I ſuppoſe I ſhall produce ſufficient Warrant and Authorities for to maintain all theſe diſtinctions, wherein I am deſirous that Commiſsioners of Sewers, for whoſe learning and inſtruction I have taken theſe pains, would apply themſelves to do their duties and ſervice herein carefully and adviſedly, and like to skilful Phyſitians, would apply fitting Medicines to the curing of every diſeaſe, elſe ſhall they oftentimes *Opprimere inſontes & dimittere reos:* But if they will ſeriouſly caſt their eyes upon theſe inſuing Caſes, they will be very helpful to them in their proceedings.

Frontage.

FRontage is where the grounds of any man do joyn with the brow or front thereof to the Sea, or to great or royal ſtreams; and in caſe of the ſea or royal River, the property of the Banks and grounds adjoyning are and belong to the ſubject, whoſe lands do but and bound thereon, but the ſoil of the ſea and royal Rivers do appertain to the King, as formerly in my Tractate of Rivers may appear. But in caſe of petty and mean Rivers and ſtreams, the ſoil of them, as well as the banks thereof, do appertain to them whoſe grounds adjoyn thereto; ſo that Frontage and Owner-

ſhip

ship in base inferior Rivers do not differ, but in great streams and the sea they do vary as aforesaid: And in 37 *lib. Assiz. plac.* 10. it seems that the Frontagers are bound to the repairs; and in 8 *H.* 7. he whose grounds are next adjoyning to a Highway, is bound to repair the same. And by these cases there is no difference touching repairs of the High streams and the highways in my opinion.

37 *Assiz. pl.* 10.

8 *H.* 7.

Ownership.

THe Ownership of a Bank, Wall or other Defence is a sufficient warrant to impose the charge of the repairs thereof upon him, without being tied thereto by prescription, as appears in 8 *H.* 7. *fol.* 5. and it stands with reason, that every man should be bound to repair his own; and the consideration is also moving, for that his grounds which lie neareſt the waters are sooneſt subject to drowning, and if any increase be upon the small Rivers it falls to his share.

8 *H.* 7.

Prescription and Custom.

PRescription and Custom are much of one quality, for in both of them the efficient matter is (use to repair) and the Law hath taken notice of them in many of our books: Prescription doth not binde or tie one to the repair of any thing, unless it be *ratione terræ*, and in this it doth differ from Custom: for if it be presented that *A. B.* and his Ancestors have time out of memory used to repair such a Bank, Wall or other Defence, this Presentment is void, and doth not binde the party *pro ut constat* in 21 *E.* 4. 38. 7 *H.* 4. 31. 19 *H.* 7. *Kelwey fol.* 52. and 45 *E.* 3. But bodies politique or coprorate may be by Custom bound to repairs, without making mention in the Presentment or Indictment that they are to do the same *ratione talis Messuagii terræ aut tenementi*; And to that purpose be the books of 21 *E.* 4. 38 *and* 44 *Ed.* 3. *Fitzherb.* Title *Bar. plac.* 103. for there

21 *Ed.* 4.
7 *H.* 4.
19 *H.* 7.
45 *E.* 3.

21 *E.* 4.
44 *E.* 3.

there a Prior was preſented, that he and his Predeceſſors had uſed time out of memory to repair ſuch a Bridge, which was in decay, and this preſentment, though it charged no Land, was good: And in *19 Hen.* 7. aforeſaid, it is ſaid, that one might be bound to repair a Bank or Wall *ratione Reſiantiæ*, but this could not be otherwiſe taken, but that he was charged to do the ſame for the houſe he dwelt in, for *Reſiantia* imports ſo much. 19 H. 7.

Alſo if a man and his Anceſtors have voluntarily made a defence for a long ſeaſon, this will not binde his Heir thereto, though he have aſſets deſcended to him in Fee-ſimple, for deſcending charges will not binde the Heirs, unleſs he deſcending have aſſets, as an equal conſideration to binde him thereto; neither will deſcending aſſets of Land binde an Heir in this caſe, unleſs the Land it ſelf be really tyed and charged.

Tenure.

A Man by the Tenure of his Land may be bound to repair a Wall, Bank or other Defence mentioned in this Law, and in proof thereof the Book Caſe of 11 *H.* 7. *fol.* 12. is full in the point; where it is ſaid, *That if before the Statute of Weſtminſter the Third, a man had made a Feoffment in Fee; or if ſince that Statute one had made a Gift in Tail, to hold the ſame by repairing a Bridge, the ſaid Feoffee and Donee and his heirs ſhould have been bound by the ſaid Tenure to repair the ſaid Bridge*; and with this agree the books of 12 *H.* 7. 18. *and* 24 *H. Br. Caſe fol.* 9. and in *Porters* Caſe in Sir *Edward Cooks* firſt Report, it is ſaid, *That if Lands were given to repair Ways, Bridges, Calceys or ſuch like, this doth binde the Owners of thoſe Lands to do thoſe repairs in perpetuity:* And in the Caſe of 12 *H.* 4. *fol.* 7. the Prior of St. *Marks* in *Briſtol* was obliged and bound by the tenor of his Land to repair a common Sewer: and this enough to ſatisfie this point. 11 H. 7. 12 H. 7. 24 H. 8. *Porters* Caſe.

Covenant.

SO likewise a man may be bound by his Covenant to repair a Wall, Bank, Sewer or other such like matter, and he may binde himself and his heirs to do the same; but yet this Covenant will not binde his heirs after his death, unless there be left assets in Fee simple to descend to the said heir from the said Ancestor which made the Covenant.

28 & 29 H.8. *Dier. fol.* 33.

Wherein I take this difference betwixt a Covenant to binde an Heir, and a Prescription; for by Covenant the Heir shall be bound to the repairs, if he have assets descended to him from that Ancestor; but the Heir shall not be bound by prescription to repair, though he have assets descended from his Ancestor who repaired the said defences: But if Land be charged therewithal by Tenure or otherwise, as a charge imposed upon Land by prescription, then the said Lands are therewithal chargeable *in cujuscunq; manus devenerint, quod nota.*

43 El. 4.

It appears by the Statute of 43 *El. cap.* 4. That if Lands, Rents, Annuities, Goods or Chattels, be given towards the repairing of Bridges, Ports, Havens, Calceys or Sea banks, that the same shall be so imployed by that Statute: So that Goods, Chattels and Annuities, be chargeable to these repairs by the force of that Statute, as well as Lands, Houses and Grounds, in case any such thing shall happen to come before the Commissioners of Sewers.

But note besides all the former matter, That an Heir shall not be bound by the Covenant of his Ancestor, though he have assets descended, unless he be bound expresly by the word *Heirs* in the Covenant.

Usus

Vſus rei.

I Now intend to declare where uſe ſhall tie one to the repairs of the defences mentioned in this Law (I do not hereby mean that uſe which I have formerly mentioned in Preſcription and Cuſtom, which is uſe to repair) but the uſe I intend in this place, is, the uſe which one is to have of the defence or thing which is to be repaired: As where one and his Anceſtors have uſed to have the uſe of the River or waters by ſailing up and down the ſame, or have uſed to have a Ferry on or over them, or a Staith to go up and down, or a Crane to draw up waters, or ſome other Engine to draw up the waters for the uſe of their houſes; Theſe uſes which men have of theſe things may be cauſes and conſiderations ſufficient to tie them to the repairs of the Walls, Banks and Rivers: And for warrant in this learning is the Book of 37 *lib. Aſſiz. plac.* 10. for there were ſome perſons which were bound to repair the River, becauſe they had paſſage on it with their boats, and others were charged becauſe they had free fiſhing in the River; and in my opinion it ſtands with good reaſon, and agreeable to Law, That thoſe perſons, before others, ſhould be bound and tied to the repairs of ſuch things whereof they have peculiar and ſeveral profits and uſe of more then others have: And it is manifeſt, that this very Statute aims full at this point, when it directed that ſuch perſons ſhould be rated, taxed and ſeſſed towards the repairs, which had profit of fiſhing and other commodities in the Rivers. 37 *lib. Aſſiz.*

But leaſt ſome may miſtake my meaning and learning alſo in the ſaid former Caſes, I will therefore make the ſame plain by diſtinction, which is this, That Frontage, Owner-ſhip, and this uſe I laſt ſpake of, do not binde any to the repairing and maintaining of Walls, Banks, Bridges, Sewers or other Defences, when and where any other man or Cor-

poration be bound to do the same by Prescription, Custom, Tenure or Covenant: For the said three parts, Frontage, Ownership and *Usus rei*, be but implicite ties onely in construction of Laws, and serve the turn onely when no other person or persons are bound expressly thereunto; and this distinction may be maintained by the Book of 8 *H.* 7. *fol.* 5. and other Books, where it is said, *That he whose grounds is next adjoyning is bound to repair, unless some other be bound to do the same by Tenure or Prescription*: Whereby it followeth, that if one be bound to do the same by special Tenure or Prescription, it freeth the Frontager.

8 H. 7.

Note also another difference, that in cases where a Frontager and one who hath *liberum passagium* on the River, and a man which hath a free Pischary there, are not any one of them bound to make the repairs alone, but all alike together: and so is the Book of 37 *Assiz. plac.* 10. and I suppose the Book of 38 *Assiz. plac.* 15. maintains this point with me; for there the Law is declared to be, *That he which is bound by prescription to repair, is bound peremptorily alone to do the work, and not any other; and if no such person can be found, then the parties whose grounds do adjoyn, and those which have free fishing in the River, and free passage thereon, be all of them to do and perform the same jointly, and no one of them is a discharge for the other, because they shall be in* consimili casu. So by this which hath been said touching these matters, the Commissioners may see and behold how carefully and understandingly the Laws of this Realm have indeavored to do equal Justice; and my desire is, that they would as carefully put them in execution.

37, 38 Assiz.

A Township Assessed.

IT hath been held for a great question, Whether a Township or Hundred in general might be assessed and taxed to the Sewers, without imposing the same on particular persons: And Sir *Edward Cook* in the Case of the Isle of

Ely,

Ely, is of opinion directly, That a Tax, Rate or a Seſſe could not nay might not be ſet or impoſed upon a Town, or upon the Inhabitants of a Town; for ſaith he, *The taxation, ſeſſment or charge ought to have theſe qualities; It ought to be according to the quantity of their lands by number of Acres and Pearches, or by the tenor of profit of fiſhing and Common of paſture, which if it ſhould be laid upon a Town, it would hold none of thoſe proportions:* and his opinion is not alone in this very point, for in the ancient Charter of *Rumney Marſh*, *pag.* 50. it is ſaid, *Quod unuſquiſq; proportione, ac periculo incumbentium æquæ contribuat*; And *page* 12 and 39 of the ſame Charter, the Taxations is expreſſed to be Acres, Perches and Carucates; and our Statute in expreſs wordsis, *And all thoſe perſons and every of them to tax and aſſeſs, charge, diſtrain and puniſh, as well within the Limits, Leets and Bounds of old time accuſtomed, or otherwiſe, or elſwhere within this Realm of* England, *after the quantities of their Lands, Tenements and Rents, and by the number of Acres and Perches, and after the rate of every perſons portion, tenure or profit, or after the quantity of their Common of paſture, or fiſhing, by ſuch ways and means as you the Lord* Fitzwilliams, *Sir* Francis Vane, *and Sir* Thomas Mounſon *Knight and Baronet, Sir* Edward Dimock, *Sir* William Armin, *Sir* Thomas Grantham, *Sir* George Fitzwilliams, *Knights*, Richard Totheby *and* Edward King, *Eſquires, whereof three to be of the* Quorum, *ſhall ſeem moſt convenient:* Theſe words literally taken, afford the conſtruction to be according to the opinion of Sir *Edward Cook.*

Caſe of the Iſle of *Ely.*

Rumney Marſh Caſe.

But on the other part I finde by many ancient Books and Authorities of the Law, that Taxations and Charges have been generally laid upon Townſhips and Hundreds in matters of this kinde, as in the 37 *lib. Aſſiz. plac.* 10. Four ſeveral Townſhips were charged with the repairs of a River, becauſe they had paſſage thereon with Boats; and in 38 *lib. Aſſiz. plac.* 15. a Townſhip was there charged with the repair of a Bridge: And the Statute of *Magna Charta, cap.* 15. *quod nulla villa nec liber homo diſtringatur facere pontes niſi*

37 & 38. *aſſiz.*

qui

qui ab antiquo facere conſueverant, ſo that if *ab antiquo* a Townſhip had uſed to repair Bridges, it was tyed thereunto by the implyed conſtruction of this Statute: And the Statute of 22 *H.* 8. *cap.* 5. gave authority to Iuſtices of Peace to charge a County, Hundred or Town with the repair of Bridges, if no certain perſon were ſpecially tyed to the repair thereof: and many times in ancient Statutes and Books of our Law, we ſhall finde Townſhips and Hundreds charged generally, as in *Doctor* and *Student*, *fol.* 74. a Townſhip was amerced; and by the ancient and famous Statute of *Winchester* a Townſhip ſhall be amerced for the eſcape of a Robber by the highway: And 3 *Ed.* 3. Title *Corone* in *Fitz. pl.* 293. a Townſhip was amerced for the eſcape of a Murtherer; and in 11 *H.* 4. 2. *Brook* 94. a Town was ſeſſed for the expences for the Knight of the Parliament and might be levied on any perſons goods of the town; and this was for the uncertainty of the perſons, and for the infiniteneſs of the number of them, as it is ſaid in *Richard Godfreys* Caſe.

But it may haps be objected on the other part, That if a Town or Hundred may be joyntly taxed, then it might ſo come to paſs, that one mans goods which had no grounds ſubject to the charge, and which could reap nor take any hurt thereby, might come to be diſtrained for the whole tax, rate or ſeſs of the Town; and another man which had great quantities of grounds there ſubject to danger might eſcape free; and therefore ſuch expoſition to be made of the ſaid Law, were not within the rule and compaſs of equality.

And another objection may alſo be made, That it is true, that by an expreſs Statute or Cuſtom, an aſſeſs, rate or tax may be laid upon a Town or Hundred, as was done by the ſaid Statute of the 22 *H.* 8. and others formerly mentioned; but ſuch expoſition were contrary to the letter of this Statute of 23 *H.* 8. of Sewers.

I do confeſs, that if theſe two objections could not be anſwered, I ſhould change my opinion: It is true, That if a tax or ſeſs had been ſet upon a Hundred by the ſaid Sta-

tute

tute of *Wincheſter*, for the eſcape of a Robber, and that charge had been levied upon one mans goods of the Town, as it might have been, he had had no remedy to cauſe his fellow Townſmen to be contributers to him to bear equal ſhare with him, and ſo if the party robbed had recovered by Action againſt the Hundred, and the goods of one in the Hundred had been taken in execution, he had no means to get contribution: And yet that Law carried that defect with it Three hundred years, or thereabouts, till in the 27 year of Queen *Eliz. cap.* 13. wherein Order was taken, that if ſome one or few mens goods were taken in execution upon the Recovery in an Action taken againſt the Hundred by the party Robbed, he or they ſhould have contribution, which before that Statute of 27 of *Elizabeth* could not be had.

But to give anſwer to the two objections: Firſt, if in our caſe of the Sewers, a Townſhip ſhould be Taxed, yet this Tax could not be taken or Levied, but only of ſuch as had grounds within the charge, which had good by the repair, or might have hurt by the neglect thereof; for in 11 *H.* 4. *fol.* 35. it is ſaid for Law, *That if a town be aſſeſſed in the Tax, and the Collector doth diſtrain the goods of a man of the town who was not chargeable thereto, that party may have and take his Action of Treſpaſs againſt the Diſtrainer and Collector, for that he at his peril muſt look well to it, that he whoſe goods were taken were ſubject to the charge.*

So in our caſe of the Sewers, if the goods of one which was not ſubject to the Tax or Aſſeſs impoſed were taken, he might have his Action of Treſpaſs againſt the diſtrainer, and ſhould recover his damages thereby; ſo this ſalve cures one of the ſaid maladies.

But then the caſe goes further, *That if the goods of one man of the town ſhould be taken for the whole Seſſe of the Town, and he is ſuch a perſon as in truth is chargeable thereunto, he can have no Action againſt the diſtrainer for taking his Cattle, for he is ſuch a perſon as cannot excuſe himſelf but that he is chargeable:* This indeed draws the Caſe to a deſperate iſſue, for this

ſeems

ſeems to be as great a miſchief as ever the Statute of *Winchester* did ever ſuffer, which was remedied by the ſaid Statute of 27 *Eliz.* but our Caſe hath not ſuch a Cure provided; Therefore it puts me to the old adage of Law, *Better it is to ſuffer a miſchief to one or moe particular perſons, then to permit an inconvenience to the whole Commonwealth which concerns a multitude:* But yet I ſhall give this objection a better anſwer, I hope, then with an old adage; for in our Caſe the party whoſe goods are taken for the whole town, is not without a fitting and convenient remedy; for when his goods be taken and he is conſtrained to pay the whoſe ſeſſment of the Town, he may make his complaint to the Commiſſioners of Sewers, and may give in the particular names of every Townſman, and the quantity of each mans Eſtate which be charged thereto, or the true value of their Lands, and may crave of the Commiſſioners of Sewers for to make a Law to make them all to contribute, every one according to his portion of Land: And in my opinion the Commiſſioners of Sewers have power to impoſe a proportionable rate upon every of them, according to the quantity and quality of his ground, by way of contribution, and may award Proceſs to force and compel them to pay the ſame to the ſaid party; whereby it plainly appears, that the party ſo diſtrained hath a direct remedy to come by his loſſes. In *Doctor* and *Student* a whole town was amerced, and they met together by common conſent, and Aſſeſſed and Rated every man equally according to his ability, and alowed of as a good cauſe.

But Commiſſioners of Sewers may if they can come to the knowledge of the certainty of every mans Eſtate, rate in the primary and original Seſſe every perſon according to his ſeveral quantity of Eſtate, which may be done in this maner, when the Commiſsioners be agreed how much to lay upon ſuch a town, then to ſend for three or four of the Inhabitants, and cauſe them to give in every mans Eſtate; and to make and appoint them Seſſors to rate every man, or elſe the Commiſſioners themſelves, having true intelligence of

of every mans Land, may eaſily ſet the rate and charge upon every particular perſon in an even and proportionable ſum; and thus every man at the firſt ſhall know his own rate, as in the aſſeſſing of the Subſidy, and no man ſhall be burthened with his Neighbors charge; and theſe were good courſes to be uſed within both the letter and ſence of theſe Laws: And this courſe was uſed by the Four and twenty Jurators in *Kent* in *Rumney Marſh*, who always upon their Oaths ſet down every particular mans ground in certain, and their juſt quantities, and accordingly were the parties ſeverally taxed. *Chart. of Rumney. pag. 50.*

Howſoever the Tax in my opinion generally impoſed upon the town is good, as appears by many Authorities and Books before remembred, even by this Statute, as well as by Cuſtom; for in the ſaid Book of the 37 and 38 *lib. Aſſiz.* it doth not appear that the Townſhips there rated were ſo taxed by any Cuſtom, but meerly by the Law of the Land; and ſo is the learning delivered to be in the Councels Order aforeſaid. *37 and 38 lib. Aſſiz.*

And I do remember, that at the Aſſizes held at *Lincoln* in *Anno* 12. *Jacobi*, in a Tryal before Sir *Edward Cook* then Judge of Aſſize, in the Caſe of Sir *Philip Conisby* Knight, the town of *Mauton* was aſſeſſed five pounds, and *Twigmore* as much, and a diſtreſs was taken for non-payment thereof; and was juſtified in a Replevin, and the verdict paſſed for the diſtrainer, and no great ſcruple was then made of the ſaid Aſſeſs laid and impoſed generally upon the towns; which Caſe I ſpecially noted, becauſe it was tryed and paſſed for current before the ſaid Sir *Edward Cook*, who had the year before reported the Law in his *Tenth Report* to the contrary. And I am alſo of Opinion, that if a new defence be agreed to be made, as a Wall, Bank, Sewer or any other, and a Seſſe is appointed for this work, and laid upon a town, That the ſame is a good Seſſe and well laid, as well as in the Caſe of old repairs, where Cuſtom may give Warrant unto it, and the Commiſſioners in their diſcretion may ſo do in imitation of the ſaid former rules and preſidents, and it ſtands with good wiſdom and diſcretion to

imitate and follow ancient and approved Laws and Statutes made in Parliament, which are done by the wisdom of the whole Realm: And in my conceit a decree made which hath no reference or dependency to former presidents, may be doubted whether it be legitimate or not, having no ancient Laws to patronize it. And thus I conclude my third point of my Case, That a Township may be taxed by the Laws of Sewers.

Tythes.

HEre is likewise in my Case a Parson Rated and Sessed for his Tythes, and is now to be put to the question, Whether by these Laws he may be taxed for them, or not. The ancient Commissions of this kinde have very strict words in them to tie every one to the charge of these defences, being for the preservation of the Commonweal; and this Statute extends it self with a long and large arme to fetch and reach every man that hath grounds lying within the Level, and which partake of the good which the defences brings to them, to be contributory to the charge.

It is true that Ecclesiastical and Spiritual persons, as Parsons & Vicars hold their Ecclesiastical living exempt *ab omni onere seculari*, for they do not hold their Churches of any Lord, but of the Lord of Heaven, in respect of the spiritual service they do therefore: And I take it, that Parsons and Vicars hold not their Churches in free alms, for then the Founder should be their Lord in point of Tenure and service, which I have not observed to be so in any: And in our Law Books it appears, that Spiritual persons were exempted from Lay and Temporal charges, as in *Magna Charta, cap.* 14. *A Spiritual person shall not be amerced according to his Spiritual living*: In *Fitz. Nat. bre. fol.* 228. there is a Writ directed by the King to his Officers and Ministers, forbidding them that they take not any Toll, Murage or Pontage of Ecclesiastical Parsons, Vicars and such like; and the said Writ sheweth, that by the Custom of the Realm

Fitz. Nat. bre.

Realm no ſuch exactions ought to be taken of them: And there is another Writ there to diſcharge them for paying Cuſtoms *de bonis ſuis Eccleſiaſticis vel de aliis pro ſuſtentatione ſua emptis*; And alſo they have this priviledge, That the Sheriff nor any Lay-Officer are not permitted to meddle with their Eccleſiaſtical poſſeſſions; for in 20 *H.* 6. *fol.* 20, and in many other Books, it is held, that in a Writ of Summons the Sheriff may not Summon a Spiritual perſon on his Spiritualities, but he muſt rather return that he is *Clericus beneficiatus non habens laicum feodum*; and upon this return the party is to take a Writ directed to the Biſhop, to Summon him on his Spiritualties: And therefore if the poſſeſſions of Spiritual perſons are had in ſuch great eſteem in our Law, what then ſhall be done with Tythes which are ſaid to be due *Iure Divino*, I have not read that they ſhall be charged to any thing but to the repair of the Temple in the 18 *chapt.* of *Numbers* the 21, 22, 23, 24, 25, 26, 27, and 28, *verſes*, The Lord ſaid, *I have given to the Children of Levi all the Tenth in Iſrael for an Inheritance*; and yet the *Levites* paid a Tenth thereout to the Prieſts; and ſo Clergymen in times paſt paid a Tenth to the Pope; and in imitation, or rather in reformation thereof by the Statute of 26 *H. cap.* 3. the like is now paid to the King, as Supreme head and Governor of the Church here on earth: So here be charges paid out of the Tythes, but they be Spiritual charges. And in Mr. *Seldens* Hiſtory of Tythe *pag.* 13. it appears by Collection and Connexion of Stories divine, That the firſt or the firſt year Tythe was paid to the *Levite*, The ſecond to Feaſt at *Jeruſalem*, and the third to the Poor: And had not the Statute of 43 of *Eliz. cap.* 2. made the Parſon and the Vicar liable and chargeable to the relief of the Poor, which was in imitation as it ſeemeth of the *Moſaical* Law, they had not been bound or tyed to do the ſame; for it is held to be more charity to relieve the Church then the Poor: And in payment of Taxes and Subſidies they are granted in their Convocation houſe, a Councel meerly conſiſting of the Clergy, and then are confirmed in Parliament

18 *chapt Numbers.*

26 *H.* 8.

Selden.

ment, of which house also they are a Member. And therefore in my opinion, seeing Tythes are so sacred a duty, that a Lay-man could not have any help for at the Common Law, and were exempt from temporal and prophane uses, I am therefore of opinion, That they are not to be rated or taxed by the general words of these Laws; Yet I am of opinion, that Tythes in the hand of a Temporal or Lay-man are to be rated by these Laws, for when they are come into his hands *Tunc res spirituales fiunt temporales & transeunt decima in Catalla.*

But I must here leave these Ecclesiastical persons and their Church livings: There is another point of this Law will reach unto some of their possessions, as to their Gleab Lands which belong to their Churches, and their Meadow and Pasture grounds, for these be not sacred, as Tythes be, But came to them by the benevolent gifts of Laymen, and not *ex dno dei & evangelii* as Tythes did; and so they took that burthen with them from the Lay-donor, which after may be imposed upon them: And therefore such Parsons, Vicars or other Spiritual persons which hold a plough Land in *Culture*, are chargable by the Statute of 2 *Mar.* towards the repair of the highways, as other Lay men be: But in that Statute there be Ecclesiastical Officers used, as Churchwardens, whereby it was conceived, that that Statute had an eye to bring Ecclesiastical persons within the reach of it: And so for their houses and grounds I take them to be within these Laws of the Sewers, for the own Lands are also chargeable thereunto, and yet on earth within His Dominions He is said to be *caput Ecclesiæ*, and as much reason were it to exempt His possessions as theris, if the respect of the person should bear any such sway in the Case.

Also I do finde by divers ancient Records, That Abbeys, Priories, and other Spiritual possessions, have been chargeable to the repair of Bridges, Caleeys, Banks and Highways, by Custom and Prescription, , as appeareth also by the Books of 11 *H.* 4. *fol.* 82, 83. *and* 44 *Ed.* 3. *Fitz.* Title

11 H. 4. 44 E. 3.

Title *Bar. pl.* 301. and I take it, that by a very expreſs and ſpecial Cuſtom or Preſcription, a portion of Tythes in a Clergy mans hand may be charged with the the repairs of Bridges, Ways, Walls or Sea Banks, but not without a direct affirmative Cuſtom; for I ſuppoſe that they may as well indure a charge in this kinde, as a charge in a *Modus decimandi*.

And ſo I conclude this part of the Caſe, That the perſon was not to be ſeſſed for his Tythes by the general words of of this Law.

A Copyholder.

HEre is alſo a Copyholder taxed within my Caſe for his Copyhold Land, and whether he for his Copyhold, and the Lord for the Freehold of that ſoil, ſhall be aſſeſſed therefore, is another queſtion.

A Copyhold by the Cuſtom of the Manor yieldeth and affordeth to the Lord Seigniory Rent, Fines due upon admittances, and ſuch like duties; but the Copyholder hath the real and viſible profits of the ſoil, & therefore both Lord & Copyholder receive *Et commodum & ſalvationem*, by the ſaid defences: And therefore the words of this Law be exceeding copious and full in this point of ſeſſe (*viz.*) To inquire who hath and holdeth any Lands or Tenements, or Common of paſture, or fiſhing, or hath or may have any hurt, or damage or loſſe by any means, in or near the ſaid places; and in this caſe the Lord holdeth the ſaid Land in Tenure, though not in *Culture*, and many ways may have hurt and damage; As if the Copyhold were overflowed by the Sea, the Lord ſhould loſe his Freehold of the ſoil, his Seigniory, yearly Rents and Fines for admittances, and all other *perqueſites*: So that the ſaid words of this Statute beat mainly upon him. But as there be reaſons to be urged againſt him, ſo there be matters to exempt him from this charge, and to lay the burthen on the Copyholder.

Firſt, though he be Lord of the Copyhold, yet he is 1.

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ſeized of the Freehold thereof, but in Imagination and conſtruction of the Law, for the Copyholder is pernor and taker of the viſible and ſubſtantial profits.

2. Secondly, the charge of repairs reſpect the poſſeſſioner *in preſenti*, which is eaſie to be found out, and not imaginary owners as the Lord is.

3. And Thirdly, if the Lord & owner ſhould both be charged *pro una eademq; re*, which the Law doth never permit, for this is not like the Caſe of Lord and Commoner, they there ſhall be charged, the one for his Soil, and the other for his Common; for in this caſe the Lord is the immediate proprietor of the Soil, and he hath the preſent and real occupation thereof, as well as the Commoner hath the uſe of his Common; and therefore they ſhall both be taxed to theſe repairs *diverſis tamen reſpectis*.

Heidons Caſe. But for the Copyholder it may be objected, that he is not within this Statute; for in *Heidons* Caſe in Sir *Edward Cooks* 3 *Report*, it is truly ſaid, *That a Copyholder is not within the Laws and Statutes which alter the Service, Tenure, Intereſt of the Land, or other thing in prejudice of the Lord*; and this is the cauſe that a Copyholders Lands cannot be extended or put in execution upon the Statute of *Weſtminſter the Second*, nor in extent upon the Statute of *Acton Burnel* and *De mercatoribus*, for if they ſhould, then might the Sheriff make the Lord new Tenants, without ſurrender and admittances, which is contrary to Cuſtom, the life and eſſence of all Copyholds; yet there is another good rule put in the ſaid Caſe of *Heidon*, that is, *That where a Statute is made for the general good and wealth of the Realm, and that no prejudice can come to the Lord by alteration of Tenure, Service, Eſtate or Cuſtom, there Copyholds may well be within theſe Statutes*; Therefore now it is to be conſidered, whether this Statute of Sewers will in any ſort hurt or prejudice the Lord or no; for it is certain, that theſe Laws tend as much to the wealth and welfare of this Realm, as any can do; and in rating and aſſeſſing theſe Copyholds to the repairs of Banks, Walls and Sewers, &c. it alters neither

neither the Copyholders intereſt, nor the Lords Tenure, nor doth it in any ſort prejudice the cuſtom of the Manor.

But then it may be objected, That if ſeſſe be impoſed upon a Copyholder for his Land, and be not paid, theſe Laws gives ſale of Lands, which indeed is the onely clauſe of this Statute which is material, to exempt a Copyholder out of theſe Laws; for clearly I take it, That Commiſſioners of Sewers have no power to decree the Copyhold Land away for non-payment of the ſeſſe: Yet I am of opinion, that a Copyholder, though he be not within that part of the Statute which giveth ſale of Lands, yet he is within the other part thereof, for divers Reaſons.

One I finde by experience, and in divers preſidents, that many Copyholds have been and be charged with repairs of Bridges and other defences in divers parts of this Realm by cuſtoms: Alſo if a Lord grant a Copyhold to *I.S.* and his heir by Copy *Tenendum* by the repairs of ſuch a Wall, Bank or Bridge, this bindes this Copyhold thereto in point of charge.

And laſtly, this Statute bindes ſuch to the repairs which may have good by the doing, or hurt by the neglect: And it is apparant, that by overflowing or inundation, a Copyholders Land ſuſtains equal damage with other Lands; and for theſe Reaſons I reſolve that a Copyhold is within theſe Laws: And ſhortly touching Copyholds, I do confine them to theſe four heads.

My four Tenents concerning Copyholds.

Firſt, a Copyhold is ſeſſable towards theſe repairs for his Copyhold. 1.

Secondly, that the Lord of the Copyhold is not to be taxed for the Soil of the Copyhold; for although he might come to it by forfeiture committed, yet that is a forain poſſibility: and although he be ſeized in Law of the Freehold, yet becauſe the Iſſues and Profits go with the Copyholder, this Law therefore will not charge him for the Soil. 2.

Thirdly, in reſpect the Copyhold rent is a rent of Aſſize, and 3.

and rents be within the expreſs letter of this Statute, and becauſe his rents by the overflowing of the Sea be loſt, therefore the Lord ſhall be aſſeſſed for it if it be of value.

4. Fourthly, I am of opinion, that a Copyhold may not be ſold by the Commiſſioners of Sewers, and yet Copyholders be within other parts of this Law.

Now becauſe it is a high point in this Statute, in what maner to rate, tax and aſſeſſe by the judicious power of theſe Laws: and in regard my Caſe toucheth all maner of Seſſes and Rates which be or may be impoſed by theſe Laws, I will therefore ſpread it abroad: and I do intend to treat of what Lands and other things are to be aſſeſſed, towards the repairs in my Caſe, and what perſons to be aſſeſſed, and in what degree.

Wherein firſt I am of opinion, that one is not to be aſſeſſed for his high and deſcending grounds, for ſo it appears was the opinion of *Brudnel* in the 12 *H.*8. *fol.*3. where he ſaith, *That if a mans ground be ſurrounded with waters, he may make a trench in his own grounds to let the waters run downwards, and to deſcend upon his neighbors grounds, for water is an element deſcendable* (*jure naturæ*) And alſo high deſcending grounds can have no ſuch uſe of Walls and Banks, as other grounds ſcituate lower may have, for the waters can have no force againſt them, and therefore the owner is not chargeable therefore; and the words of the Commiſſion expreſſed in the Regiſter be, *Qui defentionem Commodum & ſalvationem per Predictas Wallias, Gutturas, pontes, Calceta & gurgites habere poterint nullatènus parcantur.* And the Charter of *Rumney Marſh* ſeems to bear the ſame ſence (*viz.*) *Quod pro ſecuritate dicti Mariſci diſtrictiones fiant ita quod æquè fiant ſecundum portiones majores & minores quas homines habent in eodem Mariſco*; But high grounds by nature need not Engines of art to defend them: And in *Rooks* caſe in Sir *Edward Cooks* 5. *Report*, and *Keighleys* Caſe, it is truly declared, *That the grounds lying on the Level which are in apparant danger ſubject to ſurrounder, are only chargeable to repairs by this Law*; But yet grounds lying on high Mountainous places

Regiſter.

Rooks Caſe.

places may be by Cuſtom, Preſcription or Tenure liable and ſtand chargeable to repairs of Walls, Banks, Sewers, Goats and other Defences: And in ſuch caſes though they be never ſo high, yet theſe Laws will reach unto them, but no charge is to be impoſed on them by this Statute, and by force thereof onely without a ſpecial Cuſtom or Preſcription to warrant the ſame.

Annuity.

IF a Dean and Chapter or other Corporate perſons or Body Politique be by Preſcription to pay a yeerly Annuity to *I. S.* and his Heirs, *I. S.* is not ſeiſable for his Annuity, yet the ſaid Corporate or Politique perſons pay the ſame in reſpect of their Lands which lie in danger of ſurrounding, and ſo the grounds be ſubject to theſe Laws, but it iſſueth not thereout: And the ſaid Corporate and Politique perſons are not charged in their Lands, but in reſpect of their Lands to pay the ſame.

Commons.

THoſe perſons which have Common of Piſchary, Turbary, or of Paſture in great Fens, Marſhes and Waſtes, may be charged, but Commoners in *agris ſeminatis* after the corn ſevered, as ſtock Commons which be of a ſmal value, are not to be charged for their Commons, but for their Lands.

Ferry.

HE which had a Ferry over a River was in 37 *lib. Aſſiz. pl.* 10. charged to repair the River, and ſo for a Ferry one may be charged by this Law.

Herbage.

HE which hath the Veſture or Herbage of grounds, as *Prima tonſura vel veſtura terræ*, may be charged to the repairs.

Free paſſage.

IT appears likewiſe, that thoſe perſons which had paſſage for their Boats on the River, were to be rated towards the repairs in 37 *Lib. Aſſiz. pl.* 10. but this is to be intended of thoſe perſons which had free and cuſtomary paſſage thereon, as a liberty and inheritance, and was not meant nor intended of poor Boatmen which come thereon with their Boats accidentally, by the general Cuſtom of the Realm.

Parks, Warrens, Chaſes.

A Man for his Park of Dear, and Warren of Conies, ſhall be charged if theſe liberties lie within the Level; but for Chaſes I ſuppoſe one is not chargeable onely, for Dear which be *feræ naturæ* not bound to certain precincts, but in that caſe the owner is onely to be taxed for the Soil.

Mart, Fair or Market.

ALſo if one have only the liberty of a Mart, Fair or Market to be kept in a place which is ſubject to ſurrounder, In my Opinion becauſe they are but caſual in their profits, and not continuall in their being, although they be conſcribed to place and circuit, yet being no part of the Soil, nor of the iſſues and profits thereof, they are not taxable within theſe Laws.

Offices.

THe Office of the Clerk of the Market, Town Clerk, or ſuch like, although theſe Officers be confined to a certain place and precincts within the Level which is ſubject to ſurrounder, are notwithſtanding exempt from theſe taxations.

Proxies, Synods.

HE which hath Proxies or Synods of Annual ſums of money, ſuch as was in the Caſe of *Proxies* in the *Iriſh Reports*, is not ſeſſable within this Law; for although the perſon is charged therefore in reſpect of the grounds, yet the ſame doth not iſſue thereout.

The Morgager for the Title he hath by the Condition to reduce the Lands back again to him, or he which hath title to Land by Action, Condition or Entry, or he which hath a contingent uſe ſhall not be taxed for them.

Neither was *Ceſtui que uſe* at the Common Law before the Statute of 27 *H.* 8. of uſes, nor is the Bargainee of Land before the Deed be inrolled ſeſſable by this Law.

Neither is one who hath the preſentation or nomination to a Church as Patron, or he which is Founder for his founderſhip, Taxable within this Statute, yet they be Tenements, the largeſt words of charge within this Law; but the Law intends the immediate poſſeſſion of ſuch Tenements which be proficuous, and not theſe things which be Tenements in Law, and which be but conveyances, and their fruit is Ceremony without Subſtance.

This Law ſetteth down ſuch things for the which one is chargeable, *viz.* (*He which hath Lands, Tenements, Rents Commons of Paſture, Profit of Fiſhing or other Commodities and ſuch as have Safety, Profit, Defence or any other Commodity*) Theſe be the words of charge recited by this Law: This word *Land* is of large extent, for it reacheth to houſe

Arrable, Paſture, Meadow, Mills, Tofts, and to all other Edifices, Moors, Mariſhs, Woods, Wood grounds, for all theſe the earth is the ſubſtance *Et omne ſolo cedet*, and the ſeveral increaſes thereof be but qualities.

The word *Tenements* is of larger extent then Lands; for it containeth all which the word *Lands* doth, and all things elſe which lyeth in Tenure: ſo that I think it ſhall be but labor loſt to enter further into the particulars thereof.

Lord and Tenant.

IF there be Lord and Tenant, and the Tenant holdeth of the Lord by yearly Rent ſervices, the Lord may be rated as well for his Rent, as the Tenant for his Land, to Annual repairs, as well as to accidental, by reaſon of theſe words in the Statute (that is, *That every one be rated and taxed according to the rate of every perſons Rent, Tenure or profit*) here be full words to charge the Lord for his Rent; and ſo Rent charges, and Rent ſeck ſhall be ſubject to ſeſſes in this kinde: for otherwiſe the Tenant of the grounds may be undone thereby, in regard the Rents going and iſſuing out of the grounds may amount to as much almoſt as the yearly value of the grounds do: But if the Rents be ſo ſmal as they are ſcarce worth the gathering, then in diſcretion the Commiſſioners may ſpare them, for *De minimis non Curat Lex*.

Alſo whether the remainder man, and he in Reverſion depending upon an Eſtate in Tail, ſhall be rated and taxed, or not, by the power of theſe Laws, is an apt queſtion for this place; and therein my opinion is, That being dry and fruitleſſe Remainders and Reverſions, they ſhall not be ſeſſed to the repairs, but the Tenant in Tail in poſſeſſion ſhall be ſolely charged: for it is more to be feared, that Tenant in Tail will cut off the Remainder and Reverſion by a Recovery, then that the Sea ſhall drown his Eſtate by an overflow.

Leſſee

Leſſee for years, and he in Reverſion.

IN the Caſe of the Leſſee for years and for life, and thoſe in Reverſion and Remainder, there is a greater cauſe of diſpute then between Tenant in Tail, and he in the Reverſion: And becauſe it is an often Caſe, I have therefore taken the more pains to reſolve the ſame.

Firſt, the Leſſee is in the preſent poſſeſſion, and ſo is ſubject to all ordinary charges; and with this agreeth *Jeffrays* Caſe in Sir *Edwards Cook* 5 Report; for there the Caſe was reſolved, that where the Inhabitants of a Town were aſſeſſed towards the repair of a Church, there the Leſſee for years was charged, and not the Leſſor, though he had a yearly Rent reſerved: For in point of the Rent this Caſe and that will differ, by reaſon Rents be expreſly within this Law; but I now ſpeak of a Leſſee where no Rent is reſerved: In 17 *Ed.* 4. *fol.* 6. a Tenth was granted to the King by Parliament, of the value of their Lands, and the Leſſee for years was charged therewithal, and ſo was the Law there taken, if the Parliament had given the Tenth part of the iſſues and profits of the Lands.

Jeffrays Caſe.

17 *Ed.* 4.

The Caſe of the Proxies in the *Iriſh Reports* doth in my Opinion in reaſon reſemble this Caſe; for the Caſe was there, *That the Biſhop of* Meath *in* Ireland *had a Proxy of fifteen ſhillings payable out of the Commandry of* Kells, *then parcell of the poſſeſſions of St.* Johns, *all which came to the Crown by the diſſolution of Monaſteries in that Kingdom, and after the ſaid Biſhop granted the ſaid Proxies to Queen* Elizabeth, *and after Q.* Elizabeth *made a Leaſe of the Commandry to Dr.* Forth, *reſerving a yearly Rent, without mentioning the Proxy*; And it was there reſolved, *That Doctor* Forth *the Leſſee for years ſhould be at the charge to pay the ſaid Proxy, with all the arrerages thereof which did incur in his time:* And ſo in the caſe of a Rent charge, the Leſſee is chargeable, and he is to pay the Tythes, and the Compoſition money due therefore: So that theſe Caſes ſway ſtrongly againſt the Leſſee for years,

Caſe of Proxies.

to

to lay the whole charge upon him, and to exempt the Leſſor.

But yet we muſt here diſtinguiſh and make a difference between Annual repairs in ordinary things, and extraordinary repairs for to furniſh the defence with petty reparations, they ſhall be laid only upon the Leſſee for years or for life; but if a new Wall, Bank or Goat, or Sewer be to be built new, and erected; or if the ancient defences be decayed in the main timber, or in the principal parts thereof, here as well the Leſſor as the Leſſee ſhall be put to the charge, for theſe things be not ordinary and annual charges, but do reach from the beginning of the Leaſe to the top of the Inheritance: as for petty reparations they are by intendment to continue but for a ſhort time, which are likely to be ſpent during the term and leaſe; but theſe new defences are apparantly done to ſave the Inheritance: And this difference holds good correſpondency with other Caſes in our Law, as in 49 *Ed.* 3. *fol.* 1. and 3 *Eliz.* in *Dyer fol.* 198. and in that Book again *fol.* 134. and in divers other Books it is holden for Law, That if a houſe in Leaſe decay in the Groundſels, Poſt or Balk, in the great timber, in direct wearing by tract of time, and not in default of the Leſſee; the Leſſee may take and cut up timber growing on the grounds leaſed to repair the ſame, and the Leſſee ſhall be at charges of workmanſhip, for the repairs are in matter of right, and do the Leſſee good during his Leaſe, and the Leſſor after the expiration thereof: And becauſe theſe great repairs extend to both their goods, therefore they ſhall both be contributory thereto: But if a houſe be decayed in ſplinting, thack, walling, or in ſuch petty matters, the Leſſee for years ſhall be at the ſole charge, for theſe may be ſpent in his own time.

49 *Ed.* 3.
3 *Eliz. Dier.*

So I ſuppoſe my meaning is herein well perceived, which is, That in petty, annual and ordinary repairs, the Leſſee alone ſhall do the ſame; but where the ſame wants in great timber, or when a new defence is to be built, they ſhall both be at the charge: And with this the Statute of

7 *Jac.*

7 *Jac. cap.* 20. doth directly in reaſon agree withal; out of which Statute it is plainly to be obſerved, that in the great repairs, as alſo in the new building, as well the Leſſor as the Leſſee ſhall be both at the charge: Yet in the Statute of 3 *Ed.* 6. *cap.* 8. there is a clauſe in effect, *That all Lots, Scots and ſums of money hereafter to be rated by the Commiſſioners of Sewers upon the Kings Lands, ſhall be gathered or levied by diſtreſs on thoſe grounds as in caſe of other perſons; and that all Bills of acquittance ſigned with the hand of ſuch Receiver or Collector, ſhall be a ſufficient Warrant to the Auditors and Receivers, and other the Kings Officers, for allowance to the Farmer or Tenant to the Kings Majeſty*; Whereby it appeareth, that the Farmer of the King ſhall not be at the charge, but His Majeſty; yet by the Statute 13 *Eliz. cap.* 9. it may be collected, that the Leſſor for years ſhall be charged, but all theſe are to be reconciled with my ſaid diverſity. 7 *Jac. cap.* 20. 13 *Eliz cap.* 9.

But now it may be objected to me; *Sir do you think it reaſonable or poſſible for Commiſſioners of Sewers to take notice at the firſt of every private mans inheritance, and the ſeveral Eſtates which the parties have therein, when it will ſcarce be poſſible by private ſearch to finde them out?* *Nota.*

To this I anſwer, That it is not reaſonable to tie the Commiſſioners to ſuch difficult and obſcure buſineſſes; but it is ſufficient for the Commiſſioners to impoſe or lay the rate, tax or ſeſſe on the grounds, or on the viſible poſſeſſors thereof: and if the money ſo rated be demanded on the Leſſee for years, or for life; or if the goods be diſtrained therefore, or they be compelled to pay the ſame, then they may come before the Commiſſioners, and ſhew forth their leaſe, and make it appear, that *I. S.* hath the Reverſion, and as the caſe is, to be charged as well as himſelf; and upon due proof thereon made, the Commiſſioners upon hearing the parties on both ſides may apportion the tax on either of them, as in Juſtice, Diſcretion and true Judgement is requiſite. And ſo if a tax be ſet upon Land, the owner may come in before the Commiſſioners, and make it to appear before them, that *I. D.* hath a common, and Rent thereout; and upon proof there-

thereof made, the Commissioners are to lay the charge accordingly: And so it shall not tie the Commissioners at the first to lay the charge upon every particular person, for that were *opus infinitum & impossibile*, but to relieve the parties upon their complaint; and this may be easily done, and it stands with the Justice of these Laws so to do: And if the parties grieved will not complain for relief, let it be justly accompted their own folly, and no injustice of the Commissioners; for the very Statute directs, that such as are grieved shall have relief upon their complaints, which confirms my opinion in this point.

1 H.4. ch.12.

Taxes, Rates and Sessments impoſed meerly by the Laws of Sewers.

I Have formerly put nine several matters to tie men to the repairs, and this, by the Laws of Sewers is the last, but not the least of them: I propose these to be by the Laws of Sewers, because they be not backed, helped, aided or assisted by Customs, Prescriptions Common right, or by any other Rule of the Common Law, or by Tenure or Covenant, or any act of the party, as all the rest be, but are only composed, made, ordered and directed by the sole power and authority of these Laws of Sewers: and these are such as fall out of all the fomer rules, and therefore *in nova causa novum remedium est adhibendum*: But yet before I enter into my own works, I will set down and declare the opinions delivered in *Rooks* and *Keighleys* Case, which seemed one of them opposite to the other: for in *Rooks* Case it is said, *That if one be bound in respect of his Lands to repair a Wall or Bank by Tenure, Prescription or otherwise, that yet the Commissioners of Sewers could not asseß the said party alone to repair the same; and said, that the Commissioners were not tied to the Rules of Prescription, Tenure, Custom or otherwise, but ought to asseß all the Level to do the same, which are to have good thereby*: But this being mistaken, is very justly and discreetly altered in the said Case of *Keighley* by the Author himself

self; for how could it be presumed, that the learned makers of this worthy Law would have stricken down at one blow so many thousand Prescriptions, Customs, Tenures, Covenants and uses, as be within this Realm, which be tied and bound to do and make the repairs in this kinde, some in consideration of houses and land, others for yearly Rents, and for other causes, which to have set at liberty, and to have imposed the charge on the Levellers, would have wrought and brought a wondrous innovation, change and alteration in these works, all which by this exposition are freed and saved: But yet there be certain Cases which of meer necessity lay the charge upon the Level, which are as follows:

The charge upon the Level.

1. First, if any grounds were heretofore by Custom, Prescription, Tenure or otherwise obliged and bound to repair any Wall, Bank, River, Sewer, Goit, Sluce, Jetty, or other Defence, which grounds so charged have been of late devoured and overflown by the Sea, and so remain; The Commissioners of Sewers are in that case tied to lay the charge now upon the Level, which stand in danger of taking hurt by the not making the repairs, or which are to receive good by the doing thereof.

2. Secondly, also if *A. B.* be bound by the Tenure of his land to repair a Bridge, Calcey or Bank, and he dieth without heirs, whereby the land escheateth to the Lord of the Fee, in this Case the Tenure is ended, and the chief Lord is not bound to the repairs, and therefore now the charge must lie on the the Level, and so is the Law if this Tenure had been in other sort extinguished.

3. Thirdly, where no persons or grounds can be known, which ought to make the repairs by Tenure, Prescription, Custom, Covenant or otherwise, then the Commissioners of Sewers are to lay the charge on the Level.

4. Fourthly, if *John à Style* be chargeable to make the re-

pairs and be not able to do the same, then the Level are to be charged to assist him etc. ch, as appears in *Keighley's* Case.

5. Fifthly, if *T. S.* by reason of his Lands or otherwise be tied to repair the Sea bank, but the hazard is so apparent dangerous to the country, that *S.* in likelihood cannot repair the same, and so the country might be in danger to be overflown ere *T. S.* alone could do it, here also the country on that Level are to be rated and taxed towards the same. *Keighley's* Case.

6. Sixthly, if the Sea at the Spring tides, or at extraordinary casual swelling tides or Floods, have broke down the fences, and overthrown the Banks, and drowned the country without any default in the party who was tied to have repaired the same; the Level shall in this case make up the breach, for things which happen extraordinarily by the Sea or great waters, which neither policy of man could prevent, nor industry or force could resist, are counted inevitable and undefendable, and so is the Law in the case of Lessee for years or for life, if they suffer by negligence their Banks or Walls to be broken down, and their grounds surrounded, they be punishable in an Action of Waste. But if their grounds be by the extraordinary rage and violence of the salt waters be borne down, and their grounds surrounded thereby, they are in this case freed from all Wastes; and in proof thereof the Case in 28 and 29 H. 8. *Dier fol.* 33. is much to this purpose, where one made a Lease for years of grounds to A. B. lying near the River of *Eye*, and the Lessee covenanted to repair the Banks of the River to preserve the Meadows from surrounder, yet after an extraordinary flood, the Banks were broken down, and the Meadows were surrounded, and it was there holden to be no breach of Covenant. Note, this was in the Case of a fresh River, whereby in this Case the Law must lay the charge of the Level, if any danger be likely to ensue by the protracting of time.

28 H. 8. *Dier.*

7. Seventhly, if one do hold his Land by the yearly payment of Ten shillings towards the repair of a Wall, if this

money will not defray the charge, there it must be laid on the Level.

Eighthly, if a new Wall or Bank be to be erected, or a new Sewer, Trench or River to be cast, or Sluce or new Gear to be built, in these cases the Commissioners must lay the charge on the Level which are to take benefit thereby, as well for new building thereof, as with the maintaining of them: for in the Case of new defences there can be no Prescription, Custom or Tenure bound to do the same. 8.

And lastly, In case there be a great Port in the country, by the which the whole country hath benefit, for the Ports and Havens as hath been said, be *ostia & janua Regni*, and are the defences to the whole country *tempore pacis & tempore belli*, and are these places, by means whereof the upland countreys be made partakers of the sea Commodities; therefore in my opinion, the extraordinary repairs of these be not altogether tyed to the Level, as in other cases, nor to Prescription or Custom of repairing, which extends but to ordinary defects, but upon great and urgent necessities: for the safety of the Port, upon the welfare whereof the safety of the country doth depend, the whole country are obliged and bound to contribute towards the repairs, for these reasons following: 9.

First, for that in time of peace it is the Gate which openeth it self to let in from Foraign parts the Ships and Barques, which bring hither to this Island such Merchandizes, Wares and Commodities, both for our profit and pleasure as we have need to use. 1.

Secondly, at these Ports we ship out to Foraign Nations our excess of Corn, Cloth, Skins, Lead and other Wares, wherewithal we do abound, and receive in truck therefore other things more useful and necessary for us. 2.

Thirdly, in time of War we have shipping here for our Soldiers, and means at the easiest charge to Transport them to such places as the King and Councel shall direct. 3.

Fourthly, in those Ports are commonly great Havens, which are the chief receptacles of all our fresh waters, into 4.

which the waters which drown the grounds of the countreys adjoyning are conveyed.

5. And lastly, it appears by divers Authors, that a country well furnished with Ports and Havens, is not more strengthned then honored thereby; and if it be as lawful as convenient to put a case of Chronicle Law upon it, in the 28 year *Eliz.* in *Holingshead* Chronicles, it appeareth what great care the Queen and the Lords of the Privy Counsel, and the Knights and Gentlemen of *Kent* took for the repairing of *Dover* Haven, what preparation was made for it, what moneys Levied, and how forward all the country was to effect that work, may be a Spectacle to others for to lend their helping hands to the maintaining of such worthy works, being of all other the most Honorable to our Nation, and the most useful to the inriching thereof; for which causes in my opinion, because the Mountains as well as the Valleys have both *Salvationem defentionem & commodum* thereby, therefore in time of need the one as well as the other should be charged by the power of this Commission, to contribute to the extraordinary repairing of the same.

Hol. Cron.

I have now proceeded in this point of Sess so far, that I take it, I may justly here make my full period of this days exercise; and I have taken up the more time herein, because thereupon a main part and strength of this Law consists: And therefore I will now apply my self to my conclusion, in the which I have already proceeded so far, that I have made it in some sort to appear, that some of the Sesses in particular are not well imposed, as the Lessee in case of the new defences was not alone chargeable, for that he in the reversion was to contribute thereto, and that no impositon ought to have been laid upon the Parson for his Tythes, but the owner of the Soil was to be charged for all; so that these two be already ruled for me: But yet if any of the Sesses should be good, then I should fail in my conclusion; I shall therefore set forth in few words, that all the Sesses are void.

And the cause is this, That the draining of the superfluous

fluous waters in *S.* appeareth by my Caſe to be only commodious for *S.* and that *D.* the other town had no good thereby: And it appears alſo, that by the repairing of the ancient Sewer in *D.* that town only had benefit thereby, therefore to aſſeſs *S.* to repair in *D.* and *D.* to contribute to *S.* where in thoſe Caſes there could be no benefit, is directly againſt the letter and ſence of theſe Laws; but herein either of them ought to have been at charge with that, by the which it took benefit, and that not otherwiſe; and therefore the mixture marred all the matter: And ſo upon all this I conclude my Argument as I did my Caſe, that the new Bank, new River, and old Sewer were well decreed, but that the aſſeſs is void *in toto & in qualibet parte.*

Finis ſecundæ Lecturæ.

Lecturæ

Lectura tertia.

IN my two preceding Cases, the main body of this great Law were contrived, and therefore I took a greater & larger compass in my Arguments therein, then otherwise I would have done; and I am now come to the execution of these Laws, wherein the life and livelihood of all Laws consist. And it may well be said of execution, as Mr. *Plowden* in *Zouch* and *Stowels* Case, in his *Commentaries, fol.* 358. saith of a fine, that it is *finis finalis exitus & effectus Legis*, so is execution the fruit, issue and end of the Law, and without it nothing is effectual, and till it come nothing is material; for to begin a Suit and stay at the declaration, were a fruitless enterprise; and to proceed on to Judgement, and to go no further, were like a Traveller which undertook a journey, and returns or sits down without further moving, before he came at the end of his intended progress. *Plow. com.*

Law, as *Cicero* saith, is but *mutus Magistratus*, the Magistrate is *Lex loquens*; but I shall adde something, which upon the matter is the sum of all things, that is, That *executio est Lex agens*. And because I esteem the time to be almost lost or mispent which is prologued out in preambles, I will therefore now briefly divide this part of this Statute into these insuing heads: *Ciceron.*

Either in punishing the body and person of the delinquent with { Imprisonment, Fine, or Amerciament.

Or

2. Or in doing execution upon the offendors goods { By distress, or by the Absolute sale thereof.

3. Or otherwise in extending upon the Real Estate, { By charging the Land in perpetuity, or temporarily; or by the absolute sale thereof.

The true and due execution of all these in a just, legal, equal and qualified decree, requireth of all other parts of Law this greatest and truest discretion, consideration, wisdom and judgement of the Commissioners: And I take it, it may stand as a ground infallible, that there be as many degrees of punishments, as there be offences; It behooveth therefore the Commissioners to be circumspect, that they apply to every offence his due punishment; for it is injustice to punish the offence committed in a wrong degree, to pronounce a Traytors judgement upon a Fellon, or a Fellons judgement upon a Traytor, is grand misprision; to imprison the body, or to fine the person, where an Amerciament is onely due, is not onely injustice in the Commissioners, but thereby also their discretions are to be drawn in question and censured.

And seeing the Statute doth so much lie upon discretion of the Commissioners, as in many parts of this Law it is mentioned; It seemeth the Parliament did give them to understand, That such as were to meddle in those affairs, should be both discreet and wise, and should strive to become learned in those affairs.

And therefore for the better furnishing of them with the true understanding of the said parts of this Statute, I have framed a Case thereupon, which doth give just occasion to treat fully of them all.

The

The third Case.

A, Gave the Office of a Ranger of a Foreſt, to which a Mannor is belonging to *I. S. & Abnepti*, and to the heirs, males and females, of their bodies in Franck-mariage, and dieth: *B.* and *C.* their legitimate ſon and daughter, and *D.* their baſtard daughter enter, and dieth in ſeiſin, and *E.* her daughter enters: The Commiſſioners of Sewers at a Court make a Law, That a Goat ſhall be repaired, and aſſeſſe ſeverally *A. B. C.* and *E.* to do it, upon ſurmiſe, that they all had benefit: *B.* and *C.* refuſe to obey, for which *B.* is impriſoned, and *C.* is fined; *A.* and *E.* tender pleas of diſcharge, which are refuſed, and they are ſeverally amerced, and a Law made, that *A.* ſhould be diſtrained, and for non-payment the diſtreſs to be ſold, without alowance of Replevin, and the intereſt of *E.* ſhould be alſo ſold, becauſe ſhe hath nothing to be diſtrained by.

I conclude, the Commiſſioners of Sewers have done due Juſtice upon the Offenders in every part of this Law.

Argumentum Lectoris.

The paſſages of this Caſe are both at the Common Law and by this Statute; The Common Law is the means, but the Statute is the matter I muſt inſiſt upon: But ſeeing the Statute Law can receive no due conſtruction, but by the rules of the Common Law, I have therefore made a harmonial compoſition of them both in my Caſe, and I do diſtinguiſh and branch out my Caſe into theſe enſuing points.

Points at the Common Law.

Imprimis, Whether this Office may be intailed or not? 1.

Secondly, Whether it be an ordinary Intail, or a Frank-mariage? 2.

Thirdly, Whether the Baſtard be inheritable to this Eſtate, or not? 3.

Points upon the Statute.

1. First, Whether the Commiſſioners have a Court, or only the ſtrength of the Commiſſion without a Court?

2. Secondly, Whether Commiſſioners of Sewers have power to impriſon and to fine? if ſo, then whether they have well behaved themſelves in this Caſe, or not?

3. Thirdly, Whether this Law doth admit of any pleas, and eſpecially of pleas of diſcharge?

4. Fourthly, Whether the Law made touching the diſtreſs be well made, becauſe it ſeemeth *prima facie* to oppoſe a main point of the Common Law, in denying of Replevins?

5. Fifthly and laſtly, if the Law made for ſale of Lands of Tenements in Tail be warranted by this Statute, or not?

Theſe be the materials of this Caſe, wherein you may perceive by the beginning, what you are to expect in the ſequel and concluſion of my argument.

Theſe Points upon the Statute are of great conſequence and importance, and tend much into the powers of theſe Laws: In the handling whereof, according to my wonted faſhion, I intend to maintain the Affirmatives of my Caſe.

Firſt Point.

I did not intend it a point of any importance in my Caſe, Whether Land might belong to an Office; for that in
1 H. 7. the 1 *H. 7. fol.* 28. in Sir *Robert Croſts* Caſe, it is reſolved it might: For there Land did belong to the Office of a Foreſter, and might belong to the Office of the Warden of the Fleet, and alſo to a Corody which was no Office, and theſe, as well as to a ſpiritual Office, Parſon, Vicar, Prebend or ſuch like; but whether or no theſe Lands might be parted from the office by alienation, I thought that an ar-
6 H. 8. gumentable point: in *6 H. 8. Dyer f.* 2. *Empſons* caſe it is ſaid, if the King create a Duke, & grant to him an anuity to maintain his Dignity, that Annuity was ſo incident to his Dignity as it could not be ſevered therefrom; and ſo of Lands belonging

longing to a Parſon, Vicar, Biſhop or ſuch like, becauſe they were given to the maintenance of them in their places, and therefore if theſe were ſevered, they might be recontinued again to their Succeſſors.

And in the Caſe of Sir *Henry Nevil* in *Plo. Com.* an Office of a Parker was granted to two, and an Annuity for the exerciſe of it; and it is there reſolved, that the Annuity might not be ſevered from the Office: and ſo it might be ſaid in my Caſe, That the Mannor which belongs to the Office was at the firſt laid thereto, or given therewithal for the maintenance of the Officer in his place by the Founder, and ſo may not be ſevered therefrom without his conſent. And touching the intailing of the Office of the Ranger of a Foreſt, it is held in *Mancels* Caſe in the Comment of Mr. *Plowden*, that the Office of a Bayliff or Receiver of the Rents of a Mannor may be intailed; So an uſe and a Copyhold, becauſe theſe concerned and depended upon Land. But the Office of the Maſter of the Hawks, or the Maſterſhip of the Horſe could not be given in Tail within the Statute of Weſt. 2. *de donis conditionalibus*, nor an Annuity which chargeth the perſon; Yet all theſe may be given or granted within theſe intailed limitations, but yet they are no intails within that Statute.

I am of opinion, That the Office of a Ranger of a Foreſt cannot of it ſelf be given in Tail, but having a Mannor belonging to it, make the queſtion of more moment; For as the Office *De ſe* is not intailable, ſo the Land *per ſe* may be intailed: But Land in our caſe is not the principal, but the acceſſary *& acceſſorium ſequitur ſuum principale*; and therefore ſeeing the Land follows the Office, as the ſhadow doth the body, and paſſeth out of his own kinde by the ceremony belonging to the Office, and not by the ceremony by which Land is transferred and paſſed, I ſhould therefore take it, that the Eſtate of the Land ſhould be ſuch as the Office of it ſelf might bear, which could not be intailed; yet becauſe in the ſaid Caſe of the Foreſter, with Land belonging to it, is taken to be in Tail in 1 *H.* 7. aforeſaid, with a remainder 1 *H.* 7.

thereof over in Fee, I am therefore concluded to make any further queſtion of it, and ſo I leave it as I found it, and do paſſe to the argument of the other points.

Second Point.

The ſecond Common Law Point is, Whether this gift in my Caſe be a Frank-mariage or another intail; I have obſerved in Books that there be five things incident to a gift in Frank-mariage (*viz.*)

1. Firſt, it muſt be to or with a Coſin within the four degrees.
2. Secondly, the word *Frank-mariage* muſt be literally expreſſed.
3. Thirdly, the Reverſion muſt be left at the time of the gift in the donor; and then there be two other things follow as conſequents.
4. Fourthly, acquital of payment of Rents and ſervices.
5. And Fiftly, warranty to ſecure the Eſtate.

And the want of theſe or any of theſe in the creation doth deſtroy that Eſtate in the conception.

Here ſeems to be two Impediments in my Caſe to hinder this gift to take root as a Frank mariage; It is made *abnepti*, which is the Coſin in the fourth degree, and the laſt in thoſe gifts, whereby the gift that way cannot have his full operation, for that the firſt Heir of their bodies is out of the former priviledges: But in regard I take it that a Frank mariage doth more reſpect his original creation *In incepto* then the deſcent of the priviledges to the Heirs *In ſuo progreſſu*, I take this to be no impediment to hinder this from being a gift in Frank mariage. But here the words in the gift preceding the words *Frank mariage* do differ much from it, for by the ſpecial limitation the Heirs Females ſhall inherit with the Heirs Males, *Simul & Semel* as Heirs in common; But in the Caſe of the Frank mariage Heirs Males ſhall firſt inherit ſingle, and for want of them then the Females.

I do agree the Law, that in caſes where the ſpecial words of limitation may in conſtruction be made to agree with the word, and limitation of Art contained in Frank mariage,

the

the gift ſhall be taken a Frank mariage, as in the Caſe of 2*H.*3.*It.ſuff.Fitz.Mordanc. plac.*52. where Lands were given in Frank mariage to *R. S. cum Alicia ſorore le donor ita quod poſt mortem dictæ Alicia & puerorum ſuorum*, the Land ſhould revert to the donor; and this was adjudged a Gift in Frank mariage, and the words *Ita quod* were holden of no validity; neither will the words of *Reſervandum Redendum Tenendum* or *Warrantizandum*; though they vary from the nature of a Frank mariage, yet they ſhall not deſtroy the ſame as an *Habendum* may do, which is the word whoſe proper place is to create the Eſtate: and therefore if any thing come therein, which is repugnant thereunto, the ſame will alter the quality of the gift: And with this agreeth the Caſe in 45 *Edward* the 3. Title *Tail* 14 and 31. where Lands were given to *I.S.* in Frank mariage with *B.* the daughter of the donor *Habendum* to them and their heirs, and this was held a Fee ſimple, and no Frank mariage. And the like Law is where Lands are granted in Frank mariage, the remainder in Fee to *I. S.* and his heirs; the Frank mariage is defeated by the opinion in *Br.* Caſes and ſo in my Caſe, becauſe there can be no reconciliation between the ſpecial words of limitation in my Caſe, and the word Frank mariage: I am therefore of opinion, that this gift is an Eſtate in Tail, according to the ſpecial limitation, and no Frank mariage.

2 *H.* 3.

45 *E.* 3.

Third Point.

Whether the Baſtard ſhall inherit to have an Eſtate in Tail, is the third Common Law queſtion; for I am clear of opinion, that a Baſtard cannot inherit to a gift in Frank mariage, becauſe adultery and fornication, which is the ſeed of every Baſtard is oppoſite to mariage, and in breach of that powerful link and knot of Matrimony, which is an Ordinance derived from the Diving power of the Almighty: And therefore ſeeing mariage is the material conſideration of ſuch a gift, Baſtardy the oppoſite can never (being out of the conſideration) come within the priviledges to inherit this Eſtate.

So

So if I give Lands to *I.* and *S.* and to the heirs of their two bodies lawfully begotten, their Baſtard cannot inherit to this gift, becauſe he is not heir of their two bodies lawfully begotten; But if the word *Lawfully* had been out of the limitation, then I ſee no reaſon but that a Baſtard may inherit to an Eſtate in Tail, as to a Fee ſimple conditional, which he might have done at the Common Law, ſeeing an Eſtate Tail may be made before mariage, as expecting to be confirmed thereby; and ſo a Baſtard born before mariage is by the conſummation of a ſucceeding Mariage made capable to inherit to them, if his poſſeſſion continue without diſturbance to his death: Yet in *Plow. Com. fol.* 57. in *Winbiſh* and *Tailboys* Caſe, it is ſaid, *That if there be a Baſtard, Eigne and Mulier puiſne, and the Baſtard after the death of the Anceſtor entreth into intailed Lands, and dyeth ſeized, this doth not binde the Mulier in caſe of Eſtates Tail, as it doth in an Eſtate of Fee ſimple:* and vouch-
39 *Ed.* 3. eth for Authority in the point, 39 *Ed.* 3. *plac. ultimo*, where the Caſe is, *That Lands were given in Tail to* I. S. *the Remainder in Tail to* C. *and* I. S. *hath Iſſue by a woman a Baſtard, and dyeth ſeized, and then the Baſtard dyeth ſeized, having Iſſue, he in the Remainder may recover the Land againſt the Iſſue of the Baſtard*; affirming, *That the continuance of poſſeſſion in the Baſtard ſhall not be prejudicial to him in Remainder:* To which Opinion I do ſubſcribe, becauſe he in the Remainder is a ſtranger in blood, and ſo cannot be concluded as the Mulier ſhall be; for a Mulier indeed is like a graft drawn out of both the bloods of Father and Mother: ſo the Baſtard is a ſlip which is derived from the ſame Stock, and had his being therefrom.

And for my own Opinion, conſidering the Statute of *Weſtminſter* 2. *de Donis* doth accept of Gifts in Tail made before Mariage, upon the hope and expectation of a ſucceeding Mariage to perfect the ſame, even ſo the Mariage ſucceeding to a Baſtards birth gives him and his Iſſue a priviledge in theſe caſes of deſcent, which is denied to other Baſtards or meer Strangers. And I ſee no reaſon where-

fore

fore that maxime and principle of Law ſhould be altered by the ſaid Statute of *Weſt.* 2. but becauſe *Mountagues* Opinion in Mr. *Plow. Com.* ſways the other way; I will therefore ſubmit this Point to men of greater judgement then my own: So that if the Law fall out for the Baſtard Iſſue, then ſhe ſhould have title to the half part belonging to the Females, and to no part belonging to the heirs Males: And with this Concluſion I do here end my Common Law Points, and will now reſort to the handling of my Statute Points.

The Sewers are a Court of Iuſtice.

I Am deſirous to attribute to this Law all the honor and dignity which may in any ſort belong to it; and therefore I am unwilling to forget any thing which may materially tend to the upholding and maintaining thereof: wherein amongſt the reſt, and the chiefeſt of them all, it is, To prove the Commiſſioners of Sewers a Court of Juſtice: I know ſome Opinion hath been to the contrary, and held, That the Commiſſioners had only the power of a Commiſſion, and not any Court; and I ſuppoſe much may be ſaid to maintain that opinion,

Firſt, becauſe in *expreſsis terminis* there is no Court ordained by this Statute, or by any other, and without words expreſs in the point, they can have no Court. 1.

Secondly, by preſidents in the like caſe it hath been held no Court, as in the Caſe of the City of *London*, in Sir *Edward Cooks* 8 *Report*, The King granted to the Major and Commonalty *Plenum & integrum ſcrutinium gubernationem & correctionem omnium & ſingularum miſteriarum*, and it was reſolved, That they had no Court in this caſe, becauſe no Court was granted to them by the Patent, as it is holden in Doctor *Bonhams* Caſe, *fol.* 119 in the ſame *Report*, wherein the principal Caſe there put ſways the ſame ways; for there the Phyſitians had power to impriſon, and to fine offendors, yet they had not any Court thereby. 2. The Caſe of the City of *London.*

And

And so if a Commission issue out of the Chancery to examine matters in a Suit there depending, and to *Oyer* and *Terminer* the same, yet hereby these Commissioners have not any Court; for in that case the Commission is derived out of the proper power of the Chancery, which is the Court, for that cause *eo instante* when it is in Commission: And one Cause cannot *uno eodemq; tempore* depend in several Courts; neither have the Commissioners upon the Statutes of Bankrupts and charitable uses any Courts: nor the Commissioners in the Case of 1 & 2 *Eliz. Dier fol.* 175. which had power to hear and determine the Office of the *Exigenter*, had not any Court, but only the power of a Commission: For in truth these are all of them rather Ministerial then Judicial Commissions, and so a Court is not proper to them.

Yet I am of Opinion, That the Commissioners of Sewers have an eminent Court of Record: It is true, that Courts had their beginnings in three sorts;

1. First, by Prescription.
2. Secondly, by Charter-grant from the Crown. And,
3. Thirdly, by Act of Parliament.

1. The Courts, Hundred and Leet began by custom, and so did the eminent Courts of *Westminster*-Hall.

2. Courts in Corporations most of them took their beginnings by Charters. And,

3. The Courts of first Fruits and Tenths, and the Court of Wards and Liveries were erected by Act of Parliament, the one in 32, the other in 33 *Hen.* 8. But to bring the question nearer home to our Statute of Sewers, which is but *additamentum legibus antiquis Sewerarum*, for they have been used from the beginning of Laws, though perhaps not known by that name: And yet before the 6 *H.* 6. they were known by that name, as by the perusal of that Statute may be collected: And therefore for the causes and reasons hereafter ensuing, I hold the same to be a Court.

1. First, for that the Statute of 12 *Ed.* 4. *cap.* 7. and our
12 *Ed.* 4. very Statute of 23 *H.* 8. calls the Commissioners of Sewers *Justices*,

Juſtices, and one cannot properly be a Juſtice or a Judge but in a Court.

Secondly, here be legal Proceedings and Proceſs; for this Statute ſaith, *That the Commiſſioners may make and direct all Writs, Precepts, Warrants, and other Commandments, to all Sheriffs, Bailiffs, and other Miniſters, &c.* And the Statute of 1 *H.* 4. *cap.* 12. hath theſe words in it *(That he that thinks himſelf grieved may purſue and he ſhall have right)* and where there be legal proceedings, and where parties grieved may come in and have remedies for the wrongs and injuries done to them, there is properly a Court of Juſtice to have them in: But in Doctor *Bonhams* Caſe the Phyſitians had no legal proceedings, and therefore parties grieved could have no remedy, which was the reaſon they had not a Court. 2. 1 H. 4.

And thirdly, the chief reaſon wherefore I take it that Commiſſioners of Sewers have a Court, is, Becauſe the Commiſſion of Sewers is a member of the ancient and renowned Court of *Oyer* and *Terminer*, which was and is a Court of great eſteem, power and authority; and ſo it was needleſs to erect a new Court in this caſe, as it was needful to erect and found the Court of Wards and firſt Fruits, the firſt would elſe have remained in the Chancery, to the which primarily it did belong, and the other was a new revenue, and wanted a Court to direct or diſpoſe of them. 3.

Fourthly, the Commiſſioners have a Clerk proper to themſelves to Regiſter their Laws. 4.

Fifthly, the Commiſſioners have power to make Orders and Decrees, which are Judgements in effect, and ſome of them cannot be reverſed but by Act of Parliament. 5.

And laſtly, Writs of Error have been brought to reverſe Judgement given in that Court. 6.

For all which cauſes I do conclude, That the Commiſſioners of Sewers have a Court of Record, although it be not holden *in aliquo loco certo*: So was the Kings Bench a Court of more Eminency then this; But *ubicunque fuerimus in Anglia*, and for expreſs Authority in the point of

Gregories Case in the *6 Report* of *Cook* chief Justice, that the Sewers is a Court of Record.

Imprisonment imposed by the Commissioners of Sewers.

IT is a point of high consequence, whether Commissioners of Sewers have power by these Laws to Imprison the body of a man for any thing touching the same, for that Imprisonment of the body seemeth to sway somewhat against the grand Charter of *England*, and against the liberty of a free-born Subject, and it is said in *Bonhams* case, 28 *H.* 8. *in Dyer*, that liberty is a thing which the Law much favoreth: and I finde in our Books of Law, That the Judges have been very careful and curious, in not extending words contained in Charters to the Imprisonment of mens bodies, unless they were express in the point: And *Clerks* Case. therefore in *Clerks* case in Sir *Ed. Cooks 5 Report*, *fol.* 64. The case is, That the Term was to be kept at St. *Albans*, and the Major there and his brethren did assess every townsman towards erecting and building of the Courts of Justice, and made an Order, That he which should refuse to assist and pay should be imprisoned, and one being Arrested and imprisoned, brought his Action of false imprisonment against the Major, who pleaded in effect, That they were incorporate Major of St. *Albans*. by King *Edward* 6. and had power granted to them in their Charters to make Ordinances, by reason whereof they made the said Order, and so justified the imprisonment: But it was adjudged against the Major, for that by the said Charter they had not any power to make an Ordinance to imprison a mans body, for that were against the grand Charter *Magna Charta.* in *Magna Charta*, *cap.* 29. *Quod nullus liber homo imprisonetur nisi per legem terræ*: But by that Book they might have inflicted a penalty, and have distrained, or brought an Action of Debt for it. In Doctor *Bonhams* case in the 8. *Report*, King *Hen.* 8. incorporated the Physitians of *London*, and gave them power by Charter to examine the Imperites, & to finde

out

out the defects *Et pro delictis suis in non bene exequendo faciendo & utendo illos per punitionem eorum delinquentium per fines amerciamentum & imprisonamentum corporum suorum*: So hereby it appears, that by the Kings Letters Patents they had power to imprison the Body; but I finde their Charters confirmed by Act of Parliament: Yet in 2 *Eliz. Dier fol.* 175. the Case is, *That the Queen did award a Commission directed to certain Commissioners, to Hear and Determine the controversies betwixt* Scrogs *and* Colshil *touching the Office of the* Exigenter, *and that if* Scrogs *should refuse to obey to make answer before them, they should commit him to Prison*; but the validity of this last Commission I much doubt of. I am of Opinion, That the Commissioners of Bankrupts and charitable uses, have no power to commit any man; but if any abuse or misdemeanor be committed in contempt or derogation of their Authorities, they may make Certificate thereof into the Chancery, and refer the punishment thereof to the will and discretion of the Lord Chancelor or Lord Keeper for the time being.

In *Godfreys* Case in the 11 *Report*, there is a discourse what Courts have power to Imprison, and which not, and there it is said, Some Courts may Fine, but not Imprison, as the Courts Leet and Sheriff turn; some others could neither Fine nor Imprison, as Courts Baron and County Courts; and some could neither Fine, Imprison nor Amerce, as Ecclesiastical Courts; And some may Imprison and not Fine, as chief Constables at their Petty Sessions for an affray done in disturbance of them; And other Courts there were which might Fine, Imprison and Amerce, as the eminent Courts of *Westminster*. *Godfreys* Case.

So that Imprisonment is not incident to every Court, nor to every offence; Yet I am of opinion that the Commissioners of Sewers may Imprison the body, for it is not only a Court of Record, but is authorized by Act of Parliament; and I suppose that there be words in the Commission and Statute which will bear this construction, which are as follow, *viz. And all such as ye shall finde negligent, gain-*

saying or rebelling in the works, reparation or reformation of the premisses, or negligent in the due execution of the Commissioners, That ye Compel them by Distress, Fines and Amerciaments, and by other Punishments, ways or means, &c. Which words are strong, and large enough to authorize the Commissioners of Sewers upon just Cause to Imprison the body; But here they are to be careful, and not to think that they may Imprison, Fine or Amerce in any case, because the words be generally put together: But this construction must be thereof made, That they may Imprison where Imprisonment is due, and Fine in cases Fineable, and Amerce in cases Amerciable, and Distrain where a Distress properly lyeth by the Rules of Law; and they may not Imprison, where by the Laws Imprisonment is not due, but every one of the said punnishments is to be used in its proper kinde; for these words promiscuously put together, must be ordered by a just and legal construction, according to the Rules of Law and Reason.

And I have known the words of a Statute generally and promiscuously put together, have been marshalled according to their distributive operations, as the Statute of 1 *Rich.* 3. which is, *That all Feoffments, Gifts, Grants, Releases and Confirmations of Lands made by* Cestui que use *should be good*; Yet though these words were generally put together, notwithstanding the wise and discreet Sages and Expositors of our Laws have so Marshalled the words of this Statute, that they made construction thereof according to the Rules and reason of the Laws, That is, That *Cestui que use* in Possession might make a Feoffment, and that *Cestui que use* in Reversion or Remainder might grant the Land, and *Cestui que use* of a discontinued Estate might release or confirm: and yet the words of this Statute were general, howsoever Reason must be the Expositor, that every thing be done in due form of Law, and not in preposterous maner.

And these matters being thus passed over, I shall endeavor my self to declare in what cases Commissioners of Sewers may Imprison, Fine and Amerce, and where not.

Fine.

Impriſonment, Fine and Amerciament.

Fines.

IF one give evil Language to Commiſſioners in Court, or diſturb the peace there, or hinder the buſineſs of the Court in a Turbulent faſhion, he may be by them Fined or committed to Priſon, or both, at the diſcretion of the Commiſſioners; for by 34 *H. 6. fol.* 24. in every caſe when a man is fined, he may be impriſoned, and by 19 *H. 6. fol.* 67 in every caſe where one is Impriſoned he may be Fined; and our Law in expreſs words gives the Commiſsioners power to ſet fines: and then by the opinion of the ſaid Books *ex conſequenti* they may Impriſon. 34 *H. 6.* 19 *H. 6.*

If one oppoſe againſt a Law of Sewers not legally in queſtioning the ſame, but refractory contemning thereof, or by diſſwading perſons aſſeſſed not to pay ſuch, or not to obey the Law, I am of opinion that a perſon is both Fineable and Impriſonable; and if this be done *in facie Curiæ*, it aggravates the contempt; and this is the Rebelling which this Statute ſpeaketh of.

If one do refuſe to obey the Decree, Rule, Order of the Court, eſpecially if it be done in affront of the Commiſſioners, when they be in execution of their Commiſſion, This is a contempt, and he is to be impriſoned for ſuch his diſobedience, and this agreeth with 37 *H. 6. fol.* 14. 37. *H. 6.*

In *Termino Paſche* 12 *Jac.* in the Kings Bench, the Caſe there was in debate between *Hitley* and *Carter*, where certain Commiſſioners of Sewers in the counties of *Huntington* and *Northampton* made a Law, That certain Townſhips in thoſe counties were aſſeſſed to a work of Sewers, and one town was rated to Five pounds, and becauſe the ſame was not paid, the Commiſſioners cauſed a Warrant to be directed to the ſaid *Carter*, to diſtrain for it, and he diſtrained the cattel of *Hetley* one of the Inhabitants, and *Hetley* brought 12 *Jac.*

brought an Action of Treſpaſs in the Kings Bench againſt *Carier* and arreſted him thereupon, and upon complaint made to Sir *Anthony Mildmay*, and Sir *John Boyer* Knights, and other the Commiſſioners of Sewers, they cauſed *Hetley* to be attached by their Warrant, and committed him till he ſhould releaſe his Actions brought againſt *Carter*, and until he ſhould be delivered out of the Priſon by Warrant to be granted by them. But afterwards *Hetley* procured a *Habeas corpus cum cauſa* out of the Kings Bench, and was removed, where all the ſaid matter appeared; and thereupon Attachments were awarded againſt the ſaid Commiſſioners, and Sir *John Boyer* appearing, was by *Cook* chief Juſtice, *Crook*, *Dodderidg* and *Houghton*, Juſtices, committed to the Kings Bench Priſon, and was fined Two hundred pounds, but was after delivered *Ex favore Regis ſed non ex Rigore Legis.*

And in my opinion, The ſaid Commiſſioners in this caſe in making a Warrant to attache *Hetley*, and in impriſoning of him for the ſaid cauſes did exceedingly erre, and the rather, becauſe they took upon them to overrule the Juſtices of the Kings Bench, being of a higher and greater authority then they were of; But this is no preſident to impeach the power of the Commiſſioners of Sewers for committing perſons offending their authorities to Priſon, if their proceedings therein be conſonant to the Laws of this Realm; but they were puniſhed in this Caſe, not for executing their power, but for exceeding their limits, and the bounds of their Commiſſion.

If a Collector, or Expenditor, or other Officer of Sewers have been negligent in the execution of his Office and place, he his fineable therefore, though his offence be but neglect, becauſe he was an Officer, and was alſo ſworn to execute the ſame duly.

But I take it, a neglect in another ordinary perſon is not to be puniſhed.

And if one be rated to pay towards repairs, and he neglect to pay the ſame at the days and times appointed, he

is

is not fineable therefore, but is to be Amerced in this Case.

If a Collector or Officer of Sewers do distrain a man, or do any other act contrary to an Inhibition of Sewers to him directed by the Commissioners of Sewers, he may be fined and imprisoned *& simile factum fuit* in 7 *H.* 4. *fol.* 33. 7 H. 4.

If a Purpresture be committed in the Kings streams, as in fixing Piles or Stakes therein, or in stopping, straitning or diverting the course of the waters from their ancient chanels or courses, these offences being presented, the offenders are fineable therefore, if in the Presentment they be found to be done *vi & armis*, or be presented by the name of Purprestures; for by 19 *H.* 6. *fol.* 8. if the offence be done 19 H. 6. with force, and so presented, then the offender is fineable, *Beechers* Case but otherwise it is if the offence be not found, but omitted, for then an Amerciament is onely due. And it is said in *Dier* 7 *Eliz. fol.* 240. *That for a Purpresture one is fineable*, 1 *Eliz. fol.* 240. and a Purpresture may be committed in *aquis Regiis* as well as in *viis Regiis*, by the opinion of *Glanvil*: And in *Keleways Report*, *fol.* 141.

And a Purpresture is taken to be an offence done to the Purpresture. King imediately, or to His possessions; But if the like offence be done to a Subject or to his Lands, it is termed a *Nusans*. *Nusans.*

The Abbot of *Mellefont* was fined for erecting a Were in the royal River of *Boyne* in *Ireland*, which is expressed in the *Irish Reports* in the Case of the Royal Pischary of the Ban in *Ireland*, and this was a Purpresture.

If one do refuse to accept an Office of Sewers, being thereto duly elected by the Commissioners, he is fineable therefore, for in *Greslies* Case 8. *Repors*, One being elected *Greslies* Case. and chosen Constable, did refuse to take the Office, and he was fined.

And if an Officer do misdemean himself in his Office he is 10. H. 6. fineable, for in 10 *H.* 6. *fol.* 6. A Tythingman did refuse to make Presentment being thereto required, and he was fined therefore. So in case of the Sewers, if one of the Jury,

Or

or which is a Surveyor, refuſe to make Preſentment when he is required by the Commiſſioners, he is to be fined. So if a Juror depart after he is ſworn on the Jury, or before he be ſworn, after his appearance be recorded, he is to be fined; And if an Expenditor or Collector, Officers of Sewers, be required by the Court to accompt for the moneys received and laid out by them, and they refuſe, they may be puniſhed by fines.

And if the Sheriff upon Writ or Warrant directed to him to return a Jury before the Commiſſioners, and he make no return thereof, nor doth not attend when he is required, he is to be fined by the Commiſſioners.

Alſo an Officer of this Court is fineable for falſities done by him in his Office, for theſe are a violation of his Oath, and is a breach of that truſt which the Court repoſed in him at his election and entrance into his Office, and therefore the Offence is greater in him then in another man.

I have learned in Books that a Fine hath theſe qualities with it.

1. Firſt, the party in that caſe is impriſonable.

2. Secondly, the cauſe for which it is impoſed is not traverſable, being meerly the Act of the Court, but if it be impoſed upon a preſentment found by Jury, then the cauſe is traverſable.

3. Thirdly, all fines ought to be aſſeſſed, abated or increaſed in *Plena curia*, and not elſwhere.

4. Fourthly, every Fine ought to be reaſonable.

And therefore I ſhall put the Commiſſioners of Sewers in minde as the Statute of 34 *Ed.* 3. *cap* 1. did the Juſtices of Peace, that thoſe Fines that they ſhould impoſe for any offence coming before them ſhould be reaſonable, having reſpect to the quantity and quality of the offence, for *Exceſſus in re qualibit jure reprobatur communi.*

34 *Ed.* 3.

But becauſe in *Godfries* Caſe it is ſaid, that *Commitment of the body to Priſon is incident to a Fine, as by* a Capias pro Fine *alſo may be collected*; Yet I hold it queſtionable, whether the Fine ſhall precede the commitment, or the commitment the Fine.

Fine. But for my own opinion, I hold that this lyeth much in the diſcretion of the Juſtices, and I finde caſes and preſidents both ways; for in 41 *Aſſiz. plac.* 12. an Officer was impriſoned *quouſq; finem fecerit*, where the Impriſonment preceded the fine: and with this agreeth 7 *H.6.fol.*25. and in 33 *H.6. fol.* 21. one was fined, and after Impriſoned for it, and there the fine did precede the Impriſonment. 7 H. 6. 33 H.6.

But upon all theſe I take the Law to be, that if one be fined, and this Fine may be levied by the Juſtices, as Juſtices of the Peace may do (but not Juſtices of Sewers) there the Impriſonment may be *quouſq; finem fecit*, becauſe the Fine is leviable by them: But the Law is not ſo of Commiſſioners of Sewers, becauſe they have no power to Levy but to extreat the Fines into the Kings Exchequer. Howſoever one before them may be both impriſoned and fined *Diverſis tamen reſpectibus*, The one for the wrong done, the other for the contempt or diſobedience to the Court. As for example, if one refuſe to be a Collector, he is finable to the King, becauſe hereby the Commonweal is without an Officer; and he may alſo be impriſoned for diſobeying the Juſtices command: and yet in my opinion it lieth much, if not altogether in the diſcretion of the Commiſſioners to impoſe or inflict both the ſaid puniſhments, or one of them, at their pleaſures, being not therein preciſely limited by this Statute.

Amerciaments.

AMerciaments be not ſo grievous as Fines be, for they be derived of the word *Miſerecordia* which ſignifieth moderation & mercy, and to that end was the Writ in the Regiſter *Moderata miſerecordia* deviſed, where one is outragiouſly amerced he might be relieved by ſuing forth that writ, which writ and the Law in that caſe is grounded upon the grand Charter *cap* 14. *Quod nullus liber homo amercietur niſi ſecundum quantitatem delicti*: And that none of the ſaid Amerciaments be impoſed *Sed per Juramentum legalium hominum de vicineto.* *Glanvil* in his Booke ſaith, *Eſt autem miſerecordia Domini* Magna Charta. Glanvil.

Regis qua quis per Juramentum legalium hominum de vicineto Fleta. *eatenus amerciand' eſt:* And *Fleta lib.* 1. *cap.* 48. ſaith, *Quod liber homo non amercietur niſi per ſacramentum pariũ ſuorum.* Bracton. And with theſe agreeth *Bracton lib.* 3. *cap.* 1. and *Fitz. Nat. bre. fol.* 72. and if the Steward ſet an Amerciament upon a man on his own head it is void.

By which authorities it plainly appeareth, that Amerciaments are to be impoſed by a Jury, or by the Oaths of good and lawful men; and therefore I have heretofore much marvelled, when ſometimes I have ſeen Juſtices of Sewers take upon them to ſet down Amerciaments, without aſſiſtance of the Jury, which act of theirs was directly againſt the ſaid great Charter of *England*, and contrary to the ſaid authorities of Law.

So that there is a difference between the impoſing of Fines which are done by the Juſtices, and Amerciaments which be by Jury, or otherwiſe, *per ſacramentum pariũ*: So is there great diverſity between the offences of the one kinde, and the other; For if one do ſuffer a Wall, Bank, or other work of Sewers to fall into decay for want of repairing, which he was bound to maintain by Frontage, Tenure, Cuſtom or Covenant, he is in this caſe to be Amerced therefore: And ſo if one be bound by any of the ſaid tyes to repair a Bridge, Calcey, Goat, Getty, Sluce, or to cleanſe a River, if the ſame by his neglect be left undone or unrepaired, he is therefore amerceable. So if one be preſented for caſting Dirt, Sand, Ballaſt, or other anoyance into the Rivers or Streams, or for digging down the Banks, or for pulling down the Walls thereof, if the preſentment do not expreſs the ſame to be done with force, or therein be wanting the word *Purpreſture*, the party preſented is then but amerceable therefore: So when one is tyed to cleanſe the Rivers for paſſage of Boats and Ballangers, or for the draining of the waters, if he ſuffer Sandbeds to lye and choak up the Channel, he is Amerceable, and not Fineable therefore, for no permiſſion, ſufferance, neglect or Nonfeaſans can be found to be by force, becauſe they

they consist not *in Agendo, & sic in similibus casibus*; Yet some cases following fall out of these rules *pro ut sequuntur*. As if the violence of waters was so great, either by breaking in of the sea in an extraordinary maner, or by a sudden flood or inundation of fresh waters after a Rain, that thereby the defences are broken down, or caused Sandbeds or other Nusances to be, these being presented, no man is Amerceable therefore, because the same could not have been prevented by policy, nor resisted by strength.

In 42 *lib. Assiz. plac.* 15. a Presentment was, *That* I. S. *had suffered trees to grow into the water, and lay in the Stream, by reason whereof ships were hindred in their passage; and there was a Writ awarded directed to the Sheriff to remove the Nusans:* but *Knivet* Justice said there, *That* I. S. *should not be Amerced, because the Nusans was no act of his, but the Trees grew so naturally of themselves.* 42 *lib. Ass.*

But perhaps it will be objected to me, Can no Amerciaments be set but by a Jury, or by the Oathes of twelve men?

Yes, I am opinion it may be done by the presentment of the Surveyors of the Sewers, for that is *per Sacramentum parium* as the Law appoints; and in a *Nonsuit* we see daily that in such case the Plaintiff is to be amerced, and this Amerciament shall be assessed by the Coroners of the County, as appears in *Greisleys* case; and so the words of the Statute and of the Law may herein be satisfied.

Now I hope I have fully instructed the Commissioners, wherein they may learn whom to Imprison, when to Fine, and how to Amerce in a legal and orderly sort, and according to the ancient and approved Rules of Law, and of the grand Charter; for in those things they are to direct their discretions by the said Rules, and they are to be guided thereby, and are not to proceed therein according to their own wills.

And herein I shall conclude the second point of this part of the Law, that is, That Commissioners of Sewers have power to Imprison, to Fine, and to Amerce; And

that *B.* for refuſing to obey their Order was juſtly impriſoned, and *C.* was as juſtly fined: And for the reaſons and cauſes aforeſaid, the Commiſsioners in their diſcretions, though the offences of both were alike, yet they had power to impriſon the one and to fine the other. And now I do intend to proceed to the fourth point of my Caſe, and the third point I intend to handle in a more convenient place.

Diſtreſs.

4 Points.

THe point of Diſtreſs in my Caſe is grounded upon theſe words of this Law, *viz. And all thoſe perſons and every of them to tax, aſſeſs, diſtrain and puniſh, as well within the metes, limits and bounds of old time accuſtomed, or otherwiſe, or elſewhere within the Realm of* England.

Three ſorts of Diſtreſſes.

Firſt, there be divers kindes of Diſtreſſes (*viz.*) Judicial, which always iſſueth out of the Rolls of the Court.

Secondly, Miniſterial, and ſuch Diſtreſſe is to be performed by the Officers of theſe Laws, without any judgement directing the ſame.

Thirdly, and there is a Diſtreſs of Common right, not given nor awarded by Judgement in Court, or by Warrant of the Commiſſioners, but incident to the thing it ſelf.

And firſt of the Judicial Diſtreſs which is awarded by the Court upon a preſentment found of a Nuſans, or in the recovery of an aſſize of Nuſans, or in an Action of the caſe, as it appears by the 42 *Aſſiz. plac.* 15. 32 *Ed.* 3. 23. and 7 *H.* 4. 8. there a *Diſtringas ad Annovendum* ſhall be awarded to remove the Nuſans; and ſo in caſe of a decay preſented; As if *I. S.* ſuffer a Bank or Wall to decay, and that be preſented, a *Diſtringas ad reparandum* ſhall be directed to the Sheriff to diſtrain *I. S.* to repair the ſame.

32 *Ed.* 3. 7 *H.* 4.

Secondly, a Diſtreſs Miniſterial is, where one is aſſeſſed or rated to pay a certain ſum of mony towards the repairing of

of a Wall, Bank, Sewer or Goat, here upon Warrant from the Commiſſioners of Sewers, the Officer expreſſed in that Warrant may diſtrain the cattel of the party which ought to pay the ſaid Rate and Seſs, and which did neglect to pay the ſame: And yet where there is a Rate and Seſs impoſed upon one by the Commiſſioners of Sewers, I am of opinion that the Collector or Officer may diſtrain therefore without any expreſs Warrant from the Commiſſioners ſo to do; and my reaſon is grounded upon the Statute, which is this, becauſe the Statute and Commiſſion which be the general Laws, do of themſelves in this caſe give a diſtreſs. And therefore in theſe caſes, the Warrant of the Commiſſioners is ſuperfluous, like to the Caſe in 20 *Eliz. Dyer. fol.* 362. where a Fine was levied of Lands, to the intent that *I. S.* ſhould have and receive a yearly Rent thereout, although in the conveyances there was no mention made that the party might diſtrain for the ſame: Yet in that Book it is mentioned to be adjudged, *That the owner of that Rent might diſtrain for the ſame, becauſe the Statute of* 27 H. 8. *in that Caſe gave a diſtreſs.* Upon which Statute the ſaid conveyance was grounded. So if their be two coparceners to whom Land doth deſcend, and they make partition, and for more equality, the that hath the better part doth grant to the other and her Heirs a yearly Rent out of her Land, but limits no clauſe or power of diſtreſs, ſhe to whom this yearly Rent is granted may diſtrain therefore; And ſo may a Bailiff diſtrain for an Amerciament in a Leet without a Warrant, becauſe the general Law gives a Diſtreſs in theſe caſes. 20 *Eliz.* 27 *H.* 8.

Thirdly, and as touching a Diſtreſs of common right, It is in caſe where one doth hold his Land of his Lord as of his Mannor, to repair a Bank, Wall or other work of Sewers, the Lord of whom theſe Lands be holden may diſtrain his Tenant of common right to compel him to make theſe repairs, and the Diſtreſs given in the ſaid Caſe of the coparceners, and in the ſaid Caſe of Amerciament in a Court of Leet, ſeem both to be Diſtreſſes of Common right:

right: And that the Law is, that a Diſtreſs lyeth for a Rate, Lot or Tax impoſed by the Commiſsioners of Sewers, it is manifeſt by the Caſe of *Rooks* in *Cooks* 5 *Report*, which is full and direct authority in the point.

In what place a Diſtreſs is to be taken.

NOw touching the place where theſe diſtreſſes are to be taken, comes next into our conſideration, wherein the quality of the matter diſtrained for, and the power from whence the diſtreſſes are derived, are to be conſidered of.

And therefore if a Lord do diſtrain his Tenant *Ratione tenuræ*, for to repair a Wall, Bank or other defence, this Diſtreſs muſt be taken on the Ground holden by this Tenure and not elſewhere, for theſe grounds are chargeable therewithal, as the opinion of Iuſtice *Sylliard* is 21 *Ed.* 4. *fol.* 38. But not as that Caſe is, but in point of Tenure; for there the Caſe was, That a preſentment was found *in hec verba videlicet Inratores preſent' quod eſt communis Regia via in Parochia Sancti Martini in Campis in Com' Middleſex inter Hoſpitia Epiſc' Dunelmenſis & Epiſc' Norwich totaliter ſuperundat' aquis & quod tam domini ſpirituales quam temporales & Juſticiarii domini Regis & Servientes ad legem & omnes alii Legis miniſtri & omnes alii per viam illam verſus Weſtmonaſter' itinerantes pro legibus domini Regis ibidem miniſtrandis & obſervandis ſepius impediuntur per quod via illa totaliter ſuperinundata exiſtit exceſſu emanationis aquæ pluvialis ibidem remanent' quam quidem aquam Epiſcopus Norwicenſis ratione tenuræ ſuæ ibidem evacuare debuit & quod ipſe & omnes predeceſſores ſui ratione Tenuræ ſuæ ibidem evacuare debent*: And in this caſe I take it the Land was charged, not as in reſpect the Biſhop of *Norwich* did hold the ſame of ſome Lord by the Tenure, to repair the Sewer to avoid the water; but his Land ſtood charged with the ſame as a charge impoſed thereon by Cuſtom or Preſcription, as by the preſident it ſelf appeareth; for if the Biſhop of *Norwich* had been by the Tenure

21 *Ed.* 4.

of

of his houſe or lands bound to avoid the waters, there needed no Preſcription to have been alleaged.

Alſo in 5 *H.* 7. *fol.* 3. there is a like Preſentment made againſt an Abbot, *Quod ipſe & predeceſſores ſui*, ought to repair a gutter *ratione tenuræ terrar' ſuar'*; but becauſe in that caſe the Preſentment did not ſet forth where thoſe Lands lay which were charged, the Preſentment for that cauſe was holden to be void: So that there is a great difference between a Tenure charge, and a charge impoſed upon Land by Preſcription; For in the caſe where a Tenant holdeth his Land to repair a Bridge, Wall or Bank of the Lord of the Fee, The Lord in this caſe may diſtrain the Tenant of Common right by the Common Laws of *England*: But where ones Land is charged by Preſcription and Cuſtom, there is no remedy to force and compel the Tenant to do the repairs but by Preſentment, and upon a Preſentment proceſs may be awarded againſt him to diſtrain him to make the repairs. 5 *H.* 7.

And if upon a Preſentment made by the Laws of Sewers, *I. S.* is charged to repair a Sewer, and a *Diſtringas ad reparandum* be awarded againſt him, the Sheriff may diſtrain the party in any place within the power of the Commiſſion of Sewers. But this being a judicial Diſtreſs which iſſueth out of the Rolls, the Juſtices are tied to the limits and bounds of the Commiſſion; Yet in 19 *H.* 6. *fol.* 7. the Caſe was, *That the Admiral of* England *hath juriſdiction in cauſes ariſing onely on the Seas, and he hath no juriſdiction or power to meddle with any thing done upon the Land:* Yet upon a Preſentment made in the Admiral Court one was Preſented and Amerced, and a Diſtreſs for this Amerciament was taken on the Land, and exception was thereto taken, that the Diſtreſs was taken out of the juriſdiction of that Court: But there *Newton* chief Juſtice and the reſt of the Iuſtices ſaid, *That the power of the Admiral to hold plea was reſtrained by Statute to matters ariſing on the Seas, but Executions were not ſo.* 19 *H.* 6.

And I have further obſerved by the Book of 8 *R.* 2. *Fitzherbert. Avowry* 253, that where no place is certainly preſcribed 8. *R.* 2.

to

to distrain in, that in such a case the Distress may be taken in any place within the power and jurisdiction of the Court, out of which the Writ or Warrant of Distress doth issue: As if one be amerced in a Court Leet or in a Court Baron, he may be distrained for these Amerciaments in any place within the jurisdiction of these Courts; and for an Amerciament set and imposed in the Sheriffs Turn a Distress may be taken for it in any place of the county; for so far the power of that Court doth extend it self.

But in the case of a sess, rate or tax imposed by the Commissioners of Sewers, a Distress for any of those may be taken in any place within the Realm of *England*; for in this case the Distress is meerly grounded upon the Statute, and is bounded by the same limits, which is as large as the Realm of *England*: And hereupon by this construction made in this legal maner, all the words in the said clause of this Statute have their full operation.

And although in *Rooks* case the Distress was there taken on the ground charged, yet that doth not prove but that a Distress might have been taken in any other place; for I verily take it, that the place where the distress was taken, in that case was not intended any material point, though in my succeeding argument for another purpose I shall make it one. So that my opinion touching distresses to be taken in cases of Sewers, appears to stand upon these three distinctions.

1. First, that the Lord of whom the grounds be holden to make the repairs, must distrain on the the grounds so holden, and not elswhere.

2. Secondly, that upon a *Distringas ad reparandum* or *Amvendum* upon a Presentment, which issueth out of the Rolls of that Court, and is a judicial process, a Distress must thereupon be taken within the bounds of the Commission of Sewers *Ex congruitate*.

3. Thirdly, a Distress for a rate, or sesse, or tax assessed and imposed by the Commissioners of Sewers may be taken in any part or place within the Realm of *England*; for this is a Distress grounded upon the Statute, and is as large as the extent

extent thereof. And ſo the difference appears where the Diſtreſs is guided by the Commiſsion, and where by the Statute.

Whoſe goods may be diſtrained.

IT comes now in turn to be handled, whoſe goods may be diſtrained and taken within theſe Laws; For the words of Diſtreſs be put ſo generally in this Statute, that they muſt receive their expoſition by the Rules of the Common Law, in regard theſe Laws do give no ſpecial direction therein; and therefore the Diſtreſs mentioned in *Rooks* caſe may in this place be queſtioned: For there *Carter* was aſſeſſed, but the goods of *Rooks* were diſtrained and taken for the ſaid Aſſeſs, and no challenge or exception was there made of it; and no marvel, for it was ſpecially found that the goods were taken and diſtrained on the grounds charged, for otherwiſe that Diſtreſs had been tortious; wherein I take this diverſity, That where grounds are chargeable to repairs of defences, and a Seſs is thereon impoſed by the Commiſſioners of Sewers, the goods of a Stranger may be taken therefore on the grounds Seſſed; and this is warranted by *Rooks* Caſe. But *Rooks* being a Stranger, his goods could not in any ſort have been taken for the Seſs impoſed upon *Carter*, but on the grounds charged: and the like Law for Rents and Services iſſuing out of Lands, the goods of a Stranger Levant and Couchant on the grounds ſo holden may be diſtrained for Rents and Services, by 7 *H.* 7. 2. and 11 *H.* 7. 4. 7 *H.* 7.
11 *H.* 7.

But put the caſe a little further, that in the Seſſions Court of the Sewers, *A. B.* is amerced for Non-payment of his Seſſe towards the repairs of a work of Sewers; and in this caſe I am of opinion, that the proper goods of *A. B.* are to be diſtrained for this Amerciament, and not the goods of a ſtranger going on his grounds charged to the ſaid aſſeſs, becauſe this Amerciament is a collateral charge, which falls on the perſon of the offendor who was to pay the

Aſſeſs, and doth not in any ſort charge the grounds: and this opinion hath warrant from the Caſe in 41 *Ed.* 3. *fol.* 26. *Br. Leet* 4. for there *A. B.* was amerced in a Court of Leet, for receiving and keeping one in his houſe which was not ſworn to the King, in which Caſe it was holden, that no goods could be diſtrained for this Amerciament, but only the proper goods of the party amerced, although the goods of others were Levant and Couchant on his ground: And further in proof of my ſaid opinion, the Caſe of the Lord *Cromwel* in 15 *El.* in *Dier, fol.* 322. doth come fully thereto, which is, That a Replevin in an Avowry was made for a pain and forfeiture of Ten ſhillings, due for the breach of a By-law, *Contra ordinem Curiæ*, and alleaged to make By-laws within the Manor by the Cuſtom thereof: In which Caſe it is apparant, that the proper goods of the party are to be diſtrained therefore, and not the goods of a Stranger Levant and Couchant on the grounds.

41 *Ed.* 3.

47 *Ed.* 3. And in the 47 *Ed.* 3. *fol.* 12. the Prior of *Tindals* Caſe, where the Prior was amerced, and another mans goods were taken and diſtrained on the grounds of the Prior for the ſaid Amerciament, and the Diſtreſs was not well taken; and ſo my opinion may be conceived, that for an aſſeſs the goods of a Stranger may be diſtrained on the grounds charged, but may not there be taken for a Fine or Amerciament, which be collateral duties, and attends upon the perſon and do not charge the Soil.

This diſcourſe being thus ended, I ſhall now enter into a matter of greater moment; and yet becauſe theſe matters be frequent in buſineſſes of the Sewers, that which I ſhall here pretermit I will in ſome other place more fully diſcourſe of.

Goods

Goods ſold.

THe further matter of this point will reſt upon this, whether goods diſtrained and taken for a Seſs and Rate of Sewers may be ſold, or not; which point hath been oftner practiſed then the Law truly decided: But before I ſhall touch upon the main, I will make an Ingreſſe to treat of ſuch matters whereby the property of a mans goods may be altered without his conſent.

And firſt, at the Common Law, if a mans goods be wrecked, waived or taken as ſtrays, or ſold in Market, overt the property may be altered. 1.

Secondly, by Cuſtom, as in *London* upon a Foraign attachment goods may be attached and ſold to another: and in 10 *El. Dyer, fol.* 279. *B.* a Cuſtom is alleaged to be in *York* of Foraign goods there bought and ſold are ſeizeable by the Corporation, and ſo in caſe of a Heriot Cuſtom. 2.

Thirdly, But the King by his Charter cannot take the properties of my goods from me, as in the Caſe of *London Cooks* Rep. the Caſe of *Auſten* and *Waltham*, where King *Henry* the 6. granted to the Corporation of Dyers there by Charter, *That if upon ſearch they ſhould finde any Clothes died with Logwood, that they ſeized them as forfeit*; but reſolved, that this Grant was in that point void. 3.

Fourthly, by a By-law in a Court Leet or Baron, the property of my goods cannot be taken from me. 4.

And fifthly, by a Judgement againſt one at the Common Law, although a mans perſon nor his Lands were lyable thereto, yet his goods were. 5.

Theſe five grounds being firſt taken, I ſhall now examine the particular of our Caſe in queſtion touching the Law made by the Commiſſioners for ſale of goods; and againſt this ſale many things may be alleaged.

Firſt, this Statute I read on gives a Diſtreſſe, and a Diſtreſſe is but a gage or pledge, and cannot be ſold; for if a Lord diſtrain his Tenants Cattel for Rent and Services, 1

he cannot ſell the Diſtreſſe: And although in 10 & 11 *El. Dier, fol.* 280. a return irrepleviſable was awarded to the Lord or Avowant, yet he cannot ſell this Diſtreſſe, nor work them by the opinion of that Book.

2. Secondly, the Statute of 7 *Jac. cap.* 20. *Raſtal Marſhes* and *Fens* doth enact, that a Commiſſion in the nature of this of ours ſhould be directed to the Biſhop of *Norwich*, and others for the Recovery of Fen-grounds; where for an aſſeſs impoſed, and for Fines and Amerciaments, expreſſe power is given by that Statute to ſell the parties goods which doth refuſe to pay, *Ergo*, without ſuch an expreſſe clauſe a ſale of goods could not have been lawful.

1 & 3 *Jac.* And by the Statute of 1 and 3 *Jac.* the forfeitures of Alehouſekeepers may be levied by ſale of their goods, by the expreſſe letter of theſe Laws: and ſo it may be inferred, that our Statute wanting ſuch an expreſs clauſe to authorize a ſale, therefore no ſale can be.

But much may be ſaid to the contrary; for although in caſes of ſale the Laws be tender, yet it is plain, that both our Common Law, Cuſtoms and Courts of Juſtice daily uſe them, and are frequent in thoſe ſales: And we know that a Diſtreſſe is properly a pledge to be detained till ſatisfaction be made, and then to be reſtored, and is not to be

3 *H.* 7. ſold: Yet in 3 *H.* 7. *fol.* 4. a Diſtreſſe taken for an Amerciament in a Leet or Law-day may be ſold as well in the caſe where the Subject hath by Charter or Preſcription the profits of the ſaid Courts, as where the King himſelf hath them; and all the reaſon which that Book yieldeth for it, is, becauſe they be the Kings Courts: But a Diſtreſs taken for an Amerciament in a Court Baron cannot be ſold; and

22 *Aſſiz.* in 22 *Aſſiz. plac.* 72. it is ſaid, *That if one recover a Debt in a Court Baron, the goods of the Debtor could not be ſold therefore:* Yet I have ſeen always in practiſe, that for Debts and Damages recovered in the County Courts, the goods of the Debtors have and be uſually ſold for them by *Levari facias*; and in my opinion this is uſed *per totam Angliam*: and a ſale in ſuch a caſe in a Court Baron by Cuſtom is good; and

with

with this agreeth the Book of 7*H.*4.*fol.*27.and 21*H.*7.*fo.*40. in a Leet Court one preſcribed and alleaged a Cuſtom to have of every one which made an affray within his Liberty, a certain ſum of money, and preſcribed alſo to diſtrain for it, and to ſell the Diſtreſſe: and with this agreeth 11 *H.*4.14. and 11 *H.* 4. *fol.* 2. A Diſtreſſe taken for the Knights Fees of the Parliament was ſold. Therefore now let us ſee and examine well by what authority our Officers of Sewers may ſell the Diſtreſſes taken. The words in our Statute which are moſt powerful in this point, be theſe (*viz.*) *To depute and aſſign diligent, faithful and true Keepers, Bailiffs, Surveyors, Collectors, Expenditors, and other Officers for the ſafety, conſervation, reparation, and making, repairing, reforming and amending of the Premiſes and every of them, and to hear the accompt of the Collectors and other Miniſters, of and for the receipt and laying out of the money that ſhall be levied and paid in and about the ſame:* Here is the word (*Levy*) uſed, and money levied is properly upon a Sale, Execution or Forfeiture; And the words of our Statute go further (*viz.*) *And to diſtrain, or otherwiſe to puniſh the debtors and diſtrainers of the ſame by Fines, Amerciaments, Pains, or other like means after their good diſcretions*; and no likelier means to theſe is there any, then to make ſale of the debtors goods for non-payment of his ſeſſe, and it is conſonant to other Laws: alſo in another part of this Statute are uſed theſe words, *And the Clerk by the Commiſſioners to be aſſigned to have Two ſhillings* per diem *of the Rates, Taxes, Lots and Waives as ſhall be aſſeſſed or loſt by authority of the ſaid Commiſſion, to be levied or paid by their diſcretions:* And ſo it ſeemeth by the very expreſſe letter of this Law, the Taxes, Seſſes and Rates may be levied by the diſcretion of the Commiſſioners, which if they pleaſe may be by ſale of the offendors goods: And in many parts of this Statute, the Juſtices of Sewers have power to make Laws, Ordinances and Decrees, which being done according to reaſon, ſhall be held for firm and inviolable: And therefore upon juſt cauſe in my opinion, the Commiſſioners may make a Law or Ordinance for the ſale

7 *H.* 4.
21 *H.* 7.

of

of goods in furtherance of this ſervice; and this being a Law which tendeth ſo much to the ſervice of the Commonwealth, and is ſo profitable and commodious for the ſame, it is therefore good reaſon to extend the ſame, and the expoſition thereof, as far as the letter and intent of the letter ſhall reach; which may be as far as ſhall ſtand with reaſon, and rules of other Laws, Statutes, Cuſtoms and Uſages of other Courts which have power in ſale of goods in cauſes of this nature, is not altogether without preſident: For in the Charter of *Romney Marſh*, *pag.* 36 & 37. It is ſaid in theſe words in a debate between *Hamo* and *Godfrey*, *Et predictus Hamo conceſsit proſe & aliis quod computabit cor' vigint' quatuor Jurat' elect' de patria ſuper diſtrictionibus & averiis capt' predicti Godfredi pro predict' Walliis & watergangiis repar' ab initio iſtius placiti uſq; nunc &c. & diſtrictiones illas ſecundum quantitatem portionis ſibi contingent interim pro predict' Walliis & watergangiis reparandum ſicut predict' eſt per predict' diſtrictiones quod idem Hamo & alii ſatisfacient in omnibus quod injunctum fuerit per predicti comput' inter eos de ſurpluſagio recepto de averiis venditis predict' Godfredi occaſione predict'.* Hereby it is manifeſt, that *Hamo* the Bailiff ſold the cattel of *Godfrey* to make the repairs of the Walls and the Waterganges; and our Statute gives power to the Commiſſioners of Sewers to do after the cuſtoms of *Romney Marſh*, which by this preſident formerly vouched, warrants the ſale of goods: yet herein I am of opinion, that the Bailiffs which diſtrain cannot *Ex officio* without a ſpecial Warrant firſt directed to them for that purpoſe from the Commiſſioners, make ſale of goods diſtrained for a Lay, Tax or a Seſſe of Sewers; And I take it, it were a good Warrant for the Commiſſioners to make an adviſed ſpecial Law of Sewers for ſale of goods diſtrained upon a juſt occaſion, before they direct any Warrant *Ex ſubito* to the Bailiffs, or for any ſuch purpoſe.

Ch. *Romney Marſh.*

But now herein follows a matter of ſome conſequence, and worthy the handling, That if by the Laws of Sewers goods may be ſold towards the repairs of theſe works, as

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in my opinion they may, Then whoſe goods may be ſold is the queſtion next to be decided; wherein to be brief, I am firm of opinion, That no goods can or ought to be ſold by the power of theſe Laws of Sewers, but only the proper goods of the party Seſſed and Taxed, though the goods and chattels of other men be Levant and Couchant on the grounds Seſſed to the repairs: For I hold it not conſonant to reaſon, nor that it ſtands with any rule of Law, That the goods and chattels of a ſtranger ſhould be abſolutely taken away from him, and ſold for the debt and default of another man. And to this purpoſe the Caſe put in the 3 *Eliz. Dier fol.* 199. may fitly be applied to this point, where 3 *Eliz.* a Cuſtom is alleaged for a Lord of a Manor to have and take the beſt beaſt which his Tenant had at his death; and if ſuch beſt beaſt ſhould be eſloyned, that then he might have and take the beſt beaſt of any other Levant and Couchant upon the Land; and this was adjudged a void cuſtom, as to the goods of a ſtranger to be made ſubject to ſuch a forfeiture.

Thus far I have purſued my Argument in diſcourſing upon theſe Diſtreſſes, and touching ſuch matters as do depend thereon, becauſe in my experience I have found them the readieſt part of the execution of theſe Laws; and I have heretofore beheld much enormious proceedings therein, both in the Commiſſioners and in their Officers, and therefore I thought it very needful to have treated thereon for their better directions in theſe affairs hereafter.

Replevins.

YEt as I finde Diſtreſſe to be the moſt uſeful execution of theſe Laws of Sewers, ſo I have ſeen the proceedings therein much ſtayed and interrupted by the uſual ſuing of *Replevins*, by which means the ſaid Diſtreſſes taken by the authority of theſe Laws have been ſet at liberty, and the work of Sewers have been much letted and hindred thereby: And therefore the fifth point in my Caſe doth miniſter a good occaſion to enter into the ſerious examination of them.

And

And now my intent is, to declare in what caſe a Replevin doth lie, and where not; and ſurely this point hath heretofore been much ſtirred in, and not without ſome cauſe, for the very Statute ſeemeth to allow of Replevins in theſe words, (*viz.*) *That if any Action of Treſpaſs, or any other Action ſhalbe attempted againſt any perſon for taking any Diſtreſs, or for any other thing concerning the Law of Sewers, that the Defendant in ſuch Action may make Avowry, cogniſance or juſtification, for the taking of the ſaid Diſtreſs, Treſpaſs or other Act, whereof the Plaintiff complained was done by the authority of the Commiſsion of Sewers, for a Lot or Tax aſſeſſed by the ſaid Commiſsion, or for other ſuch act or cauſe as the Defendant did by the ſaid Commiſsion:* And in what action can a man ſo properly make his Avowry, Cogniſance or Juſtification as in a Replevin, being a word only apt for that action; and a Diſtreſſe is *de ſua natura*, properly repleviſable by the Common Law: and for direct authority in the point, it appears in *Rooks* Caſe, that a Replevin was there ſued for the delivery of the Diſtreſſe taken by the power of theſe Laws of Sewers: But I muſt here diſtinguiſh, for I am of opinion a Replevin doth not lie, nor ought not to be granted from the Sheriff, or any of his Deputies, for that the Sewer is a Judicial Court of Record, & of greater authority then the power of the Sheriff, which in theſe caſes was but Miniſterial, and the higheſt authority that he hath is but vicontiel, which is much inferior to the power of this Commiſſion; and therefore the Sheriff is not of ſufficient power to ſupercede a Court of higher power. Yet if one ſue a Replevin, which afterward in Bank was abated, and a return of the Cattel there awarded, another Replevin did lie by the opinion of the Book of 34 *H. 6. fol.* 37. and ſo it appeareth by the Statute of *Weſtminſter, cap.* 2. but theſe new Replevins came out of the ſaid Courts where the former was, for it is not likely, that the Sheriff could make deliverance by his warrant of Cattel, contrary to the award and return of a Court of Juſtice in a *Retorno habendo*; and therefore by the ſame Statute of *Secunda deliberatione*, is now to be awarded out of the Rolls

34 *H. 6.*

of

of the Court whence the *Retorno habendo* came: And if one would reſemble this caſe with other authorities, and with the reaſon of other Book caſes of the Law, it will be made thereby apparant, that the higher Court may take or remove a cauſe out of the inferior Court, but not *Econtra*, neither can the inferior Court ſuperſede the ſuperior: For if one be impleaded in the Kings Court at *Weſtminſter*, and in coming towards *London* he is arreſted in a Corporation Court, he may be delivered thence by the power of the ſuperior Court to the which he was attendant, & the power of the inferior Court ſhall be ſuperceded thereby, as the Law is declared in divers of our Books; By the which it is plain, that ones perſon being in the priviledge and protection of the Kings Court, could not juſtly be Impriſoned by the power of an inferior Court: And in *Stringfellows* Caſe in 3 *Ed. 6. Dier fol. 67.* The goods of one were ſeized by the Sheriff by proceſſe out of the Chancery for a Subject, and after ſeiſure, and before delivery thereof was made, a Writ of Prerogative came out of the Exchequer, rehearſing thereby, that the King was to be ſerved before any other, and commanded the Sheriff to levy the ſame on the goods of the ſame Debtor; And whether theſe goods that lay under the power of a Proceſſe in one Court might be taken from thence by the power of another Court, was the queſtion; and the better opinion therein, as I take it was, that they could not, for that by the former Proceſſe they were priviledged from all other Juriſdictions, Powers and Authorities, eſpecially if they were of an inferior degree: Yet there be two caſes which not being curiouſly looked into make ſhew as if the Law were otherwiſe; the one is in the 11 *H. 4. fol.* 2. where the goods of *I. S.* were taken in Execution by the Sheriff by a *fieri facias* which came out of the Kings Court of *Weſtminſter*, and the Sheriff ſold them to *I. D.* and there was a Replevin ſued in that caſe, but no deliverance made of the Cattel in Court: and the other caſe is in 7 *H. 4. fol.* 28. goods were taken by a Levy which iſſued out of a Court Baron, and they were ſold by the

3 *Ed. 6.*

11 *H. 4.*

7 *H. 4.*

Bailiff, & there was also a Replevin sued, but no deliverance made of the Cattel in Court, neither would the Court order the Defendant to gage deliverance: so that by these two cases it may seem that a Replevin did lie though another Court had formerly the Jurisdiction of the Cattel taken by the Distresse: But, under favor, I hope I shall easily reconcile these books, and shall make it to appear that they do not make against my opinion formerly delivered upon this diversity, That when the goods were seized or taken by Processe, and remained by the vertue thereof in the hands of the Sheriff or of his Bailiffs, during that time no Replevin did lie in the Case, but after such time as the goods or cattel were sold away, as in the said two Cases formerly alleaged they were, then against the party that bought them, or any other, a Replevin did lie in the Case, for after the sale they were out of the protection of the former parties, and then a Replevin might well take hold of them, being out of all other Jurisdiction. And the same difference I take in this Case of the Sewers, that is, That so long as goods distrained by Warrant and Process out of this Court of Sewers remain in the custody thereof, they be not replevisable by the Warrant of the Sheriff or of his Deputies, but after they be sold away, then by the sale thereof they are out of the protection and priviledge of the Court of Sewers, and then the Sheriff may cause them to be delivered by Replevin. Yet it may be objected unto me, that in *Rooks* Case a Replevin was taken against him which detained the distresse by Warrant of the Commissioners of Sewers, it is true, the Book is so, which case I admit, and that the Replevin was well granted there, yet I take it, it doth not contradict my said opinion, because there *Carters* was assessed, but the goods of *Rooks* were taken and detained for the Sesse, and *Rooks* did sue the Replevin, which he might well do, because against him or his goods there was not any Law of Sewers extant or in force, neither was he or his goods within the priviledge or jurisdiction of these Laws of Sewers: But if *Carters* Cattel had been taken, who

was

was the very party ſeſſed, he could have had no Replevin from the Sheriff or his Deputies to deliver his Cattel.

But although a Replevin doth not lie in the caſe aforeſaid from the Sheriff or his Deputies, *Ex officio* to deliver a Diſtreſſe of Sewers, yet out of the Kings Courts at *Weſtminſter* a Replevin doth lie in thoſe caſes. And the Charter of *Romney Marſh pag.* 181. doth afford us in this caſe a very good preſident; for there complaint was made to the King, ſetting forth thereby, That whereas his Highneſſe had appointed and authorized *Henry de Bathonia* to be his Juſtice, and to determine the differences depending and touching the repairing of the defences of the ſaid *Marſh*, he had ordained, that Diſtreſſes might be taken according to the 24. Jurators, *Et quod nullus vicecomes aut alius balivus noſter intromittat in diſtrictionibus illis, to tamen* (meaning the Sheriff of *Kent*) *nihilominus diſtrictiones illas propter hoc factum per viginti quatuor Juratores in prejudicio conſiderationis eorundem reluxaſti, tibi igitur precipimus quod diſtrictionibus illis in nullo te intromittas*, and in the ſame Charter the like matter is there alſo ſo determined of, *pag.* 7. By the which may be collected, that the Sheriff *Ex officio* might not meddle with ſuch Diſtreſſes: and in the ſame Charter, *pag.* 8. the words be further, *Quod ſi quis de conſideratione predict' diſtrictionis ſe injuſte gravat' ſentiret & inde conqueri vellet ad ipſum Dominum Regem querelam ſuam deferret & ipſe in Curia ſua juſticiam fieri faceret reſervatis*, whereby it is manifeſt, that a Replevin lay for a Diſtreſſe taken in the Kings Court, for that they be of a ſuperior authority and juriſdiction to theſe inferior Courts of Sewers. And therefore the Replevins which our Statute aims to give way to, are intended to be taken out of the Kings Courts, which in Law and Juſtice ought to be obeyed, and not from the Sheriff or his Officers by vertue of their Office only.

Ch *Romney Marſh.*

But in my caſe the Commiſſioners made a Law, that the goods of *A.* ſhould be ſold without allowance of Replevin, which is a good Law upon the diſtinctions and diverſities aforeſaid; that is, that *A.* who was the perſon aſſeſſed

might not have or take a Replevin becauſe he was a perſon bound expreſly by the Law, nor that the Sheriff or his Officers *Ex Officio* might grant a Replevin to deliver the ſame, being under the power of this Law of Sewers.

But the Kings Courts at *Weſtminſter* may in thoſe caſes of Sewers deliver the Diſtreſſes, and this conſtruction made of this Statute, as I take it, ſtands with Law and reaſon: 13 Ed. 3. And in the 13 Edw. 3. *Brook, Replevin, plac.* 60. the Caſe is put, a man did grant to *A. B.* a rent out of his grounds, with power that if it were behinde that he might diſtrain therefore, and detain the Diſtreſſe againſt gages and pledges, and yet it was adjudged, that if the Rent were behinde and the grantor diſtrained, he could not detain this Diſtreſſe againſt the Replevin: Yet here were the direct words of the party himſelf to the contrary, but his words could not overrule the Law. So that upon all theſe matters, I hold theſe Tenents following:

1. *Imprimis*, To make a general Law to reſtrain all Replevins, granted either from the Sheriff or the Kings Courts, is no good Law or Ordinance of Sewers; for that Replevins *de jure* are in ſuch caſes grantable out of the Kings Courts, and ſuch a general Law ſavors too much of oppreſſion, in ſtopping up the Gates of Juſtice.

2. Secondly, for a Sheriff or his Deputy to grant and award Warrants of Replevin *Ex officio*, to deliver goods or cattle diſtrained, and detained for a Taxt and Law of Sewers, is in my opinion againſt Law, and need not to be obeyed, for that the Diſtres was *Sub protectione ſuperioris Curiæ*, which is of a higher degree then a Sheriffs Miniſterial Warrant.

3. Thirdly, if a Diſtreſſe be taken and ſold for a Seſſe of Sewers, a Replevin lyeth againſt the buyer, for by the ſale the goods and cattel were put out of the protection of the Court of Sewers.

4. Fourthly, if a Rate or Taxt be impoſed by the Laws of Sewers upon *I. S.* & the goods of *John Downs* be taken therefore on the ground of *I. S.* which were charged, *I. D.* may ſue a Replevin of his ſaid cattel from the Sheriff, for that he

nor his goods were not expreſly bound by the Laws of Sewers.

Fifthly, a Replevin lyeth out of the Kings Courts of *Weſtminſter*, to deliver a Diſtreſſe taken and detained by the Laws of Sewers, for that they be Courts *de altiore natura.* 5.

Sixthly, a Diſtreſſe taken by a Lord on his Tenant for not repairing a work of Sewers, which by the Tenure of his Land he ought to do and repair, the Tenant may ſue a Replevin from the Sheriff *Ex officio* to deliver the Diſtreſſe, for that this Diſtreſſe was not taken or detained by Warrant, Judgement or Decree of Sewers. 6.

Seventhly, If upon a Judgement given in the Kings Court, or upon a Decree made in this Court of Sewers, a Writ or Warrant of *Diſtringas ad Reparandum*, or of that nature be awarded, and the parties goods be thereby taken, theſe goods ought not to be delivered by Replevin to be taken either out of this Court, or out of any other Court of the Kings, becauſe it is an Execution out of a Judgement. 7.

Eighthly, although one grant a Rent out of his Land with clauſe of Diſtreſſe, and with Grant or Covenant that the Grantee may diſtrain and detain this Diſtreſſe till he ſhall be ſatisfied his Rent, Yet a Replevin lieth in that Caſe. 8.

A perpetual charge.

SO now I have fully and at large declared my opinion touching Diſtreſſes and Replevins; wherein, I hope, I have fully ſatisfied the firſt point of my Caſe: I intend therefore now to proceed to the ſixth point, which concerns charges and ſales of Lands to be made by the Commiſſioners of Sewers by the power and authority of this Law.

And, firſt I ſuppoſe the queſtion may be extended to this, that is, Whether the Commiſſioners of Sewers can impoſe a per-

a perpetual charge upon Land to repair a work of Sewers for ever by the power of these Laws.

I do here acknowledge, that this is a knotty Point, yet something may be alleaged in maintenance of this Opinion Affirmatively: For in the parts of *Holland* in the County of *Lincoln*, almost every one knows which part he is to repair and maintain in perpetuity; And *Experientia est optima interpres rerum*; And it appeareth by the Charter of *Romney Marsh*, *pag.* 12. That the use there was to impose perpetual charges on singular persons; For the words there be these, *Farateres per eor' sacramen' mensurabunt per perticam omnes terras & Tenementa quæ infra dictum Mariscum periculo subiacent quibus mensuration' factis viginti quatuor per communitatem prius electi & jurati habito respectu ad quantitatem Wallia' terr' & Tenement' quæ periculo subiacent per eor' Sacramentum ordinabunt quantum ad predictarum Wallia' sustentationem & reperationem faciend' & sustinend' ad quemlibet pertineat, ita quod proportion' acrar' terrar' periculo subiacent' singulis assignetur sua portio pertican' & predict' assignatio fiat per locos certos ita ut scietur ubi & per quæ loca, ad quantum, singuli defendere tenantur.* These words in this Charter seem to be plain; That by the Laws established in *Romney Marsh*, the Commissioners had power to assign to every man his portion to repair in perpetuity; but I finde no such words in our Statute: And whereas it may be said, that our Commissioners have power to make sale of the Lands; *Ergo*, They may charge them perpetually; but this is a *non sequitur* for that, for the sale they have expresse Warrant, but not so for the charge: And powers and authorities must be duly pursued, and are not to be taken by equitable or argumentable collections or implications, so that it may seem the Laws of Sewers were never held so perdurable as to binde mens Lands with perpetual charges: And therefore this difference I take, That by the Custom of a town or country, every one may know his particular portion, which the owners of grounds are obliged and bound to repair perpetually; but without such a Custom it hath been held

Char. *Romney Marsh*, *pag.* 12.

held, That the Commissioners of Sewers cannot binde any mans inheritance to a perpetual charge, by any power or authority given by this Statute; but in the said case of *Romney Marsh*, the Custom there maintained this point: yet *Nota bene verba hujus Statuti*, which be these (*viz.*) *And to make and ordain Statutes, Ordinances and Provisions from time to time as the case shall require, for the safegard, conservation, redresse, correction or reformation of the Premises and every of them, and the parties liable to the same, necessary and behoofful after the Laws & Customs of* Romney Marsh *in the county of* Kent, *or otherwise, by any ways or means after their own wisdoms and discretions:* These be the words, and this is the clause which must make good this perpetual charge, for that it doth formerly appear, that such like Laws and Customs there were in *Romney Marsh* as this is; and therefore I may conclude this point, that the Commissioners in imitation of the said Ordinance of *Romney Marsh*, may make Decrees to binde Lands to perpetual charges: Yet Sir *Edward Cook* in *Reighles* case sets it down as resolved, *That the severall Commissioners of Sewers throughout all* England, *are not bound to pursue the Laws and Customs of* Romney Marsh; but in case where some particular place within their Commission have such Laws & Customs as *Romney Marsh* hath, there they might pursue them. But in my own opinion, the Commissioners may, if they please, make Ordinances and Laws like to those of *Romney Marsh*, where there hath not been any such use; and the words of the Statute, as I take it, will bear that construction; and the said opinion of Sir *Edward Cook*, is not directly against this. And upon Decrees for sales of Land, it is usual in these Decrees to binde those Lands to the perpetual repairs.

Sales of Lands.

THe words of the Statute which be made for sales of Lands be these, *Provided always, That if any person or persons being assessed or taxed to any lot or charge for any Lands, Tenements or Hereditaments within the Limits of any Commission here-*

hereafter to be directed, do not pay the ſaid lot and charge according to the Order and Aſſignment of the Commiſſioners, having power of the execution of the ſaid Commiſſion, &c. by reaſon whereof if it ſhall happen, the ſaid Commiſſioners for lack of payment of ſuch lot & charge, to Decree and Ordain the ſaid Lands and Tenements from the owner or owners thereof, and their heirs, and the heirs of every of them, to any perſon or perſons for term of years, term of life, Fee ſimple, or Fee tail, for payment of the ſame lot and charge: Then every ſuch Decree and Ordinance ſo by them ingroſſed into Parchment, and certified under their ſeals into the Kings Court of Chancery, with the Kings royal aſſent had to the ſame, ſhal binde al and every perſon and perſons that at the making of the ſame Decree had any intereſt in ſuch Lands, Tenements and Hereditaments in uſe, poſſeſſion, reverſion or remainder, their heirs and Feoffee and every of them, and not to be in any wiſe reformed, unleſs it were by authority in Parliament hereafter to be ſummoned and holden within the Realm.

And alſo that the ſame Laws, Ordinances and Decrees to be made and ordained by the Commiſſioners, or any ſix of them, by authority of the ſaid Commiſſion, ſhall binde as well the Lands, Tenements and Hereditaments of our Soverign the King, as all and every other perſon and perſons, and their heirs, and ſuch their intereſt as they ſhall fortune to have in any Lands, Tenements and Hereditaments, or other caſual profit, advantage or commodity whatſoever they be, whereunto the ſaid Laws, Ordinances and Decrees ſhall in any wiſe extend, according to the true purport, meaning and intent of the ſaid Laws.

This Clauſe or Proviſo was ſtrangely placed in this Statute, as if this Statute had not been the firſt Father of it, and as if this Law had made ſome addition to a former Law: But I take it, that this Statute was, and is, the firſt and only Law which gave ſale of Lands in caſes of Sewers, and this Clauſe ſtands upon theſe four pillars.

1. *Imprimis*, for what cauſe Lands may be ſold by the Commiſſioners of Sewers.

2. Secondly, what Lands are to be ſold within theſe Laws.

Thirdly,

Thirdly, what perſons, what Eſtates and Intereſts are to be bound thereby. 3.

Fourthly, to what perſons theſe Lands may be ſold or decreed. 4.

The Statute is, *If any perſon ſeſſed do not pay*; whereby it is manifeſt, that the Lands are to be ſold for ſeſſes and charges impoſed by the Commiſſioners which lyeth in payment only, and they may not be decreed away for any other cauſe or matter: And therefore if one hold his Land to repair a Wall, Bank, Sewers or other work of Sewers, and he neglect to repair the ſame, the Commiſſioners of Sewers cannot for this cauſe decree the Lands away from the owner, becauſe this charge lay not in payment: And I cannot gather out of the words of this Statute, that Lands can be decreed for any cauſe then for Non-payment of a Lot, Seſs or Charge, by reaſon this word *Payment* is reiterated three or four times in this branch of the Statute, and no other words be coupled with it to infer any other or larger expoſition.

If *I. S.* do hold his Lands of the Lord of a Manor by the payment of Twenty ſhillings yearly or other ſum, towards the repairs of a work of Sewers, and he do neglect to pay the ſame, whereby the work is unrepaired, although this is a charge which lyeth in payment, yet becauſe it grows due by Tenure by the Common Law, and was not impoſed by the force of this Statute, therefore the Lands of *I. S.* cannot be decreed from him by the Non-payment thereof, by the tenor and vertue of this Law of Sewers.

But if the Lands of one be generally charged to repair ſuch a Wall or other work of Sewers by Preſcription, Covenant or otherwiſe, and the Commiſſioners impoſe a ſeſſe and rate upon him to repair it, and he do not, there in this caſe, although the charge was by the rules of the Common Laws, yet becauſe the ſeſſe and rate was ſet upon him by the power of this Statute, I am of opinion, that for neglect of payment the ſaid Lands may be ſold by the decree of the Commiſſioners of Sewers.

So if one do hold his Lands for the payment of Twenty ſhillings to repair a Bank, and the Commiſſioners of Sewers do order the party to pay the Twenty ſhillings at a time by them preſcribed (not being contrary to the uſual days of payment) and he do neglect to pay. The Commiſſioners may decree his Lands from him, becauſe this charge, by reaſon of the ſaid Order, had got the force and power of this Statute.

If a charge be generally laid upon a Townſhip, Hundred or Rape, which is not paid according to the Commiſſioners Order, no Lands can be decreed in this caſe, becauſe no perſons or Lands be in this caſe particularly charged, and the decree of the ſale muſt be directed by, and depend upon the ſeſſe: But if after the general ſeſſe be laid, the ſame be after aſſeſſed upon particular perſons by particular ſums by the ſaid Commiſſioners, then upon default of payment, their Lands making default may be decreed from them by the power of this Statute.

If an aſſeſſe or charge of payment be laid upon certain Lands without mentioning the Owner, the Lands cannot be decreed from him by this Law; for the words of the Statute be (*That if any perſon or perſons aſſeſſed to any Lot or Charge do not pay*) So that I ſhall take it, that no decree for ſale of Land can be made but where there is a perſon certainly aſſeſſed by name.

Lands cannot be decreed away from the owners for default of payment of Fines, Amerciaments or Pains; for though theſe be ſums of money or charges impoſed by the Commiſſioners of Sewers of perſons certain for matters touching theſe Laws, yet becauſe they were not ſeſſed or rated towards the repairs of any works of Sewers, but be ſet upon the parties as mulcts and puniſhments, and be due to the King, therefore no decree of Lands can be made for any of them.

2. Now the ſecond part of this clauſe is, what Lands may be decreed by the authority of the ſaid Statute; and thereby it appears they muſt be ſuch Lands as lie and be within the

the power of this Commiſſion of Sewers; and herein reſts a difference between the caſe of a Diſtreſſe for a ſeſſe which may be taken in any place within this Realm, and the decree of ſale of Lands for Non-payment of a ſeſſe which muſt lie within the bounds and extent of the Commiſſion; for this Diſtreſſe is circumſcribed to the extent of the Statute, which is over the whole Realm, and the ſale is tyed to the limits of the Commiſſion: And I am alſo of opinion, that no Land can be ſold away by the decree of the Commiſſioners of Sewers, but ſuch as were charged with the ſeſſe.

If one hold his Lands in *Comitat' Eborum* to repair a Sea-bank in the County of *Lincoln*, and the Owner is aſſeſſed therefore, and makes default of payment, the Commiſſioners of Sewers in the county of *Lincoln* may give warrant to diſtrain for this ſeſſe in the county of *York*; but they cannot decree away by ſale thoſe Lands lying there which were charged with the ſeſſe.

A Copyholders Land cannot be decreed againſt him by this Law, for if it might, then theſe cuſtomary Lands ſhould be transferred from one to another, contrary to the Cuſtoms of the Manors whereof they be pareel; and it would infringe that rule which is delivered in *Heidons* Caſe in *Cooks 3 Report*, which is when an Act of Parliament doth alter the ſervice, Tenure and intereſt of the Land or other thing, in prejudice of the Lord, or of the Cuſtom of the Manor, or of the Tenant, there the general words of ſuch a Statute doth not extend to Copyholds: And in this caſe if any ſale ſhould be made by the Commiſſioners, all the ſaid rules ſhould be infringed, for it were contrary to the Cuſtom to paſſe theſe Lands without ſurrender; it were in prejudice of the Lord to have Copyhold-land paſſed, and he to have no Fine: And I am likewiſe of opinion, that the Freehold of theſe Lands could not be paſſed away for a ſeſſe or a lay, becauſe the Lord hath but the ſhadow, and the Copyholder hath the ſubſtance; But if the Lords Rents of Aſſize ſhould be aſſeſſed as they ought to be, and he do neglect to pay, then theſe Rents might be decreed from him; and ſo may

Heidons Caſe.

all other Lands, Tenements and Hereditaments decreed, in respect whereof one is seisable and seised by the Laws.

3. The third Branch of this clause is the direct point in my case (*viz.*) *What persons & what estates be bound by these decrees?* And first of the Heirs in Tail, whether they be bound by a decree made against the Donees in Tail their Ancestors, is the question; In the handling whereof I hold it fitting, to shew in what cases the Heirs in Tail have been bound by the act of their Ancestors, and the reasons and causes thereof.

And therefore if a Disseisor make a Gift in Tail, and the Donee in Tail grant a Rent to the Disseisee for release of his right, this will binde the Heir in Tail, for that by this release his Estate which before was defeisable is now confirmed, as by the Books of 44 *Ed.* 3. 22. and 20 *Ed.* 4. 13. appeareth: and so in 46 *Ed.* 3. a gift in Tail was made *Itaquod* the Donee might alien to the benefit of the Heirs in Tail, and and this by Judge *Welbey* was held a condition which bound the Heir in Tail for his benefit. And in 12 *Ed.* 4. 1. *Tregouse* and *Talarums* Case was, That a recovery against Tenant in Tail, with a Voucher by him over, did binde the heirs in Tail, by the Common Law, by reason of the intended recompence which was to come to him by the Voucher, and so a lineal warranty with assets, and a collateral warranty without assets, were and be both of them bars to the Issues, by reason also of the intended recompences; and these are things which were originally tied to those Estates, and were incidents to them *ab initio*: And therefore this shall suffice to treat of bars to the Issues in Tail by the Common Laws; and now I shall proceed to shew in what cases they were barred of their Estates by the Statutes of this Realm.

16 *R.* 2. By the Statute of 16 *R.* 2. *cap.* 5. The Lands and Tenements of one attaint in a Premunire are to be forfeited to the King; and in 21 *Eliz.* one *Trudgin* was Tenant in Tail, and was attainted in a Premunire, and the question was, Whether Intailed Lands were forfeited against the Issues in Tail, or not? And in Doctor *Foster's* case in *Cooke* 11 *Re-*

port,

34 *Ed.* 3. 20 *Ed.* 4. 46 *Ed.* 3.

12 *Ed.* 4.

21 *El.*

C. 11 *Rep.*

part, it is there ſaid to be reſolved, that the general words of that Statute did not repeal the Statute of *Weſtminſter* 2. of Intails, and ſo the forfeiture was there reſolved to continue but for the life of *Trudgin*, and did not binde the Iſſues in Tail.

A Judgement in Debt againſt Tenant in Tail, or if he be bound in a Statute or in a Recognizance in the nature of a Statute, the Lands Intailed were not extendable nor to be held in extent by the Statutes of *Weſtminſter* 2. *Action Burnel*, or by the Statute *de Mercatoribus* by any of the general words of theſe Laws; but the Statute of 33 *H.* 8. *cap.* 39. by expreſſe words bindeth the heir in Tail, for their Lands whoſe Anceſtors ſtood indebted to the King by Judgement, Recognizance, Obligation or other ſpecialty. 23 H. 8.

But the Statute of 26 *H.* 8. *cap.* 13. Enacts, *That every one which ſhall be attainted of Treaſon, ſhall forfeit the Lands whereof he is ſeized of any Eſtate of Inheritance*; and by this Statute Intailed Lands were forfeited; and the words (*Of any Eſtate of Inheritance*) were the words which gave that forfeiture, the one in Fee ſimple, the other in Fee tail; and the word (*any*) preſuppoſeth more Eſtates of Inheritance then one. 26 H. 8.

But whether a Decree of ſale of Lands made by Commiſſioners of Sewers ſhall binde the heirs in Tail, is the point of my caſe, and in my opinion I think they ſhall be barred, for the cauſes and reaſons following:

Firſt, the words of the Statute of Sewers be, *That ſuch a Decree ſhall binde all and every perſon and perſons that at the making of the ſame Decree had any intereſt in ſuch Lands, Tenements & Hereditaments in Uſe, Poſſeſſion, Remainder or Reverſion, their heirs and aſſigns.* So that by expreſſe words it bindes the heirs, and it would have bound the heirs of a Tenant in Fee ſimple, without the word (*Heirs*) expreſſed in the Statute; therefore the word (*Heirs*) needed not, but onely for the binding of the heirs in Tail.

Alſo if theſe Lands were charged by Preſcription, as many Lands be, then were the Lands originally bound,

and

and the heirs in Tail ſtand charged with theſe ſeſſes, as well as Land in Fee ſimple.

And laſtly, this is a Law enacted for the preſervation of the Commonweal, and is more to be favored then particular Eſtates of heirs in Tail: But the caſe of the Premunire was penal in point of a forfeiture, which is to be ſtrictly taken for the King, and favorably for the ſubject; and therefore in my opinion, the heirs in Tail ſhall be bound in theſe caſes of ſale, and the rather becauſe they be within the words of the Statute, *videlicet*, Heirs generally put, which extends to heirs in Tail, as well as to heirs in Fee ſimple; and becauſe the ſeſſe and charge ſhall binde both alike, ſo in my opinion the ſale ſhall binde both, in regard the ſale depends upon the charge and ſeſſe.

If a Prebend, Parſon or Vicar, Dean, Biſhop or ſuch like, which be ſeized of Lands in their politique capacity be ſeſſed to repairs of works of Sewers, their Lands cannot be decreed away from them in ſuch ſort as to binde their ſucceſſors; for as this Statute of Sewers extend to binde Lands by decrees in perpetuity, ſo the Statute of 1 and 13 and 14 *Eliz.* reſtrain Alienations, and where thoſe Statutes reſtrain them, I am of opinion, that this general Statute of Sewers doth not diſpence with thoſe Statutes. In *Croft* and *Howels* Caſe in *Plow.* Comment. a fine with Proclamations and non-claim by five years did binde the Corporation of the Myſtery of the Cooks in *London* for their right in Lands, and ſo all other Corporations which are abſolute of themſelves, and needed not the aſſent of any other, as Majors and Commonalties, Deans and Chapters, Maſter and Fellows of Colledges; But the Law is otherwiſe of Parſons, Vicars, Prebends, and ſuch like; And the like expoſition do I make of them in this Statute of Sewers. But I will here make a diſtinction; I am notwithſtanding of opinion, That the Parſons, Vicars, Prebends, and ſuch like, for their own neglect, are bound during their times, but not their ſucceſſors after them; And note, this Statute though it mention heirs, yet it doth not at all mention ſucceſſors

Croſts and *Howels* Caſe.

ceſſors, which is worthy of conſideration alſo: And in my opinion this Statute as to Decrees to be made of Lands will binde women, Covert Baron, Infants, perſons that be *non ſanæ mentis* and ſuch like, becauſe it is a Law made for the ſafety of the Commonwealth: And ſo it is held in *Zouches* caſe in the *Com.* That the Statute of 4 *H.* 7. of fines had bound Infants, Ideots and Women Court Baron, had they not been excepted in that Statute; *A forciori* ſhall they be compriſed in this Statute, for the Statute of fines was made for the peace of the Weal-publique, but the Statute of Sewers was made for the ſafety thereof. *Zouches* Caſe.

If there be two Tenants in Common which be ſeſſed towards the repairs of a Wall, Bank or ſuch like work of Sewers, and one of them do neglect to pay his proportionable part, Whether Commiſſioners may decree a moyety without partition both of the ſeſſe and Land, is a queſtion; for their Eſtates are ſeveral, though there be a community in taking of the profits: And therefore the matter is, whether the aſſeſſe ſhall attend upon the poſſeſſion which is in Common, or upon their Eſtates which be ſeveral: And although Commiſſioners in aſſeſſe be not bound to take notice of their Eſtate, yet if they take upon them to decree a mans Lands from him, they are then to take notice of his Eſtate, and of all other circumſtances neceſſarily depending thereupon: In 22 *H.* 6. *fol.* 12. if a Treſpaſſe be done upon Lands which are held in Common, they are to joyn in an Action, but if one of them die that Action ſhall ſurvive, for though they were joynt in the perſonalty, yet they disjoyned in the realty; And if two Tenants in Common of Land joyn in a grant of Ten pounds rent charge out of their Lands, the Grantee ſhall have Ten pounds yearly of either by the opinion of Mr. *Perkins*: But if a ſeſſe of Ten pounds be laid and impoſed upon them by this Law of Sewers, this ſeſſe ſhall not double as the Rent ſhould; yet in this caſe of a joynt aſſeſs impoſed upon Tenants in Common, and one would pay his moyety, and his companion refuſeth, the Commiſſioners of Sewers cannot ſell a moye-

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ty of the Land, for that it is a joynt ſeſs, and was not impoſed by moyeties, and the ſale doth depend upon the ſeſs, and all may not be ſold; for that one Tenant in Common cannot prejudice his companion in things of Realty.

4. The fourth matter is to whom Lands may be decreed by this Law; for by the words of the Statute it appeareth, That the Commiſſioners have power to decree Lands for default of payment for years, for life, in Tail, or in Fee ſimple; whereby the Law intended they ſhould make their decrees for ſale, according to the quantity of the ſeſs, and ſo ſhould uſe moderation in the Eſtates they made or ſold therefore; and it was not intended they ſhould ſel the Feeſimple away for ſeſs which might be ſatisfied with the making of a leſs Eſtate.

And I am of opinion, that this decree doth make the Eſtate, with the help of this Statute, according to the limitation which ſhould therein be declared, and that the party ſhall have Eſtate according as the ſame is thereby limited unto him; and this is no equitable decree which bindes the perſon onely, as Chancery decrees be, but it bindes the Land, and therefore the Commiſſioners may not decree Lands to a Corporation, as to a Major and Commonalty, Dean and Chapter or ſuch like, which be Mortmain, for the general words of this Statute do not repeal the Statute of Mortmain in my opinion.

And herein I ſhall end my Argument touching decrees; and I take it, though the intereſt of *E.* was intail, yet the ſale thereof might be made by this Statute for the cauſes and reaſons aforeſaid: And now only remains under my cenſure to declare my opinion, whether the Commiſſioners of Sewers did Juſtice, in refuſing to admit of Pleas of diſcharge which were tendred to them by *A.* and *E.* wherein may come juſtly into our conſiderations theſe things, (*viz.*) Whether Traverſes, Pleas of Exemptions, and other legal proceedings, may be had in this Court of Sewers, or not; ſaving I adde this, that theſe decrees of ſale being binding, muſt be certified into the Chancery, with the Kings Royal aſſent had thereto.

Legal

Legal proceedings.

Traverſe.

TO enter into theſe parts of my Law, I think it fit to begin with *Traverſe*, and to deliver my opinion, whether ſuch Pleas and Proceedings are to be admitted into this Court; for a Traverſe is a Plea of the party, containing matter to the contrary of that that the party ſtands accuſed of, or which is laid to his charge: And in ſome caſes our books and authorities of Law admit the party to a Traverſe, and in other caſes the ſame is to be denyed; for in the 5 *H.* 7. *fol.* 9. & 45 *Ed.* 3. *fol.* 8. & 28 *H.* 8. in *Dier, fol.* 13. if one be preſented in a Leet Court for a Blowipe or any other perſonal wrong, this Preſentment is not Traverſable, but the party is without remedy therein, though the Preſentment be falſe and the matter of it untrue; and the Law is ſo alſo of ſuch a Preſentment made in a Sheriffs Turn: and herewithall agreeth the books of 2 *R.* 3. 11. and 19 *H.* 8. 11. *Fitz. Abſt. plat.* 442. and 8 *Ed.* 4. 5. and the reaſon thereof is delivered in 5 *H.* 7. becauſe no Proceſſe is there awardable againſt the party to call him to anſwer: Yet in the ſame Book of 5 *H.* 7. it is ſaid, *That if a Preſentment be made which toucheth a mans Freehold, he may there Traverſe the ſame.* But I take it the party muſt firſt remove the Preſentment into the Kings Bench, and there Traverſe it; for in the Court Leet, in my opinion, there can be no Traverſe taken or tryed, no more where the Preſentment toucheth Freehold, then where it only concerneth a perſonal wrong: Therefore the reaſon alleaged in 5 *H.* 7. cannot be the true cauſe wherefore in perſonal wrongs the Preſentments cannot be traverſed; but the very true reaſon therein is, as I take it, becauſe theſe petty Preſentments be of ſuch petty trifling matters, that in avoidance of trouble the Law eſteemed them not worthy of Traverſe and Tryal; and Juſtice *Fairfax* in 5 *H.* 7. is of opinion, *That a Preſentment made before Juſtices of Peace in a Seſſions is traverſable:* and with

5 *H.* 7.
45 *Ed.* 3.
28 *H.* 8.

2 *R.* 3
19 *H.* 8.
5 *H.* 7.
8 *Ed.* 4.

this agreeth *Stanford, fol.* 183. and in other Courts of Law there oftentimes fall out matters which one ſhall not be admitted to take a Traverſe unto, and in ſome other caſes he ſhall, as by theſe ſucceeding authorities may appear. In the 37 *Aſſiz. plac.* 7. a Preſentment was taken before *Green* and *Ingham*, Juſtices of the Kings Bench, That *I. S.* who had killed *A.* had goods to the value of Eighty pounds in the hands of one *John Lombard*, and upon this Preſentment a *Scire facias* was awarded againſt *John Lombard*, to ſhew cauſe wherefore theſe goods ſhould not be ſeized to the Kings uſe: *John Lombard* came in and tendred a Plea to the Preſentment, that theſe goods were not the felons, but that they were delivered to him to keep to the uſe of a Cardinal of *Rome*, and he was there admitted to this Plea; and with this agreeth 43 *Ed.* 3. *fol.* 26. expreſſly. Yea in that book and Mr. *Stanford, fol.* 185. it is holden for Law, That if it be preſented before a Coroner that *I. S.* killed *A. B.* and fled for the ſame fact, and after upon his tryal he is acquit, yet he ſhall forfeit his goods upon the *Fugam fecit* before the Coroner, and he ſhall not be received to take any traverſe to the ſaid Preſentment in that point. The difference in which two caſes is this in my opinion, that a ſtranger, as *John Lombard* was, in the the firſt Caſe, ſhall not be peremptorily concluded, for it were no reaſon one mans goods ſhould be forfeited in another mans default, and he ſhould have no anſwer thereunto: But in the other Caſe, in Terror of Felons, though he be acquitted of the Felony, yet he is not acquitted of the flying, and he may be guilty notwithſtanding his acquittal. There be other caſes in the Law which admit no Traverſe, as in *Fawnes Bags* caſe *Cook* 11. *Rep.* where a Writ was directed to the Major and Burgeſſes of *Plymouth* to reſtore *Bag* to his Aldermans place there, which they had put him from, and they return a cauſe ſufficient to bar him, which notwithſtanding is falſe, yet he ſhall not be received to his Traverſe therein, neither could a Traverſe be admitted in the Certificate of the Biſhop, wherein was contained, that *I. A.* Parſon of *Dle* had refuſed to pay his

Fawnes Bags Caſe.

his diſmes to the King, by means whereof the Parſon loſt his benefice, which caſe is in *Br.* caſes, *temp. He.* 8. *pl.* 332. and *Dier* [illegible] *fol.* 116. and 7 *H.* 4. *fol.* 4. and 21 *H.* 7. 8. and many other Books be, that no Averments ſhall be taken to the returns of Sheriffs to take any Iſſue thereupon. *Br.* Caſe. 7 H. 4. 21 H. 7.

And in Dr *Banhams* caſe upon a *Habeas corpus* the Phyſitians returned the cauſe of his impriſonment, which was falſe; yet he could not be admitted to traverſe the ſame. But yet by the opinion of theſe Books, an Action upon the caſe lieth againſt the Major and Aldermen, & againſt the Biſhop, for their certificates, and againſt the Sheriff for their falſe returns, and if Juſtifications be made by them they may be traverſed: But theſe will not reduce the parties to their former liberties (*viz.*) not the Alderman to his place, nor the Parſon to his Church, but damages in thoſe caſes are only recoverable.

Theſe caſes I have put as Reaſons and Arguments againſt our Caſe of Sewers. But yet I am of opinion, that a Traverſe may be taken to a Preſentment made in this Court of Sewers, and herein this Court may be reſembled to a Seſſions of the peace: And this Commiſſion of Sewers gives the Commiſſioners of Sewers power to hear & to determine at the Kings ſuit, as well as at the ſuit of the party, and a Traverſe lyeth of a Preſentment found before Commiſſioners of *Oyer* and *Terminer*, and is triable before them by the Books of 29 *Aſſiz. pl.* 33. and 12 *lib. Aſſiz.* 21. and the Earl of *Leiceſters* Caſe in *Plow. Com. fol.* 397. and the words of this Statute are ſufficient to yield the party the benefit of a Traverſe if there be cauſe; and for preſident in the point, Chart. of *Romney Marſh pag.* 23, and 24. one *Godfrey* being preſented that he ought to repair a Bank or Wall, and that he did neglect to do the ſame, and he came in and pleaded a Plea thereto before the ſaid Commiſſioners, and in 19 *lib. Aſſiz. plac.* 6. there were divers Preſentments before Commiſſioners of *Oyer* and *Terminer* for Nuſances done in the River of *Lee*, and the ſame were there traverſed and tryed: And the Statute of 1 *H.* 4. *cap.* 12. doth plainly admit of a Traverſe, wherein the words be, 29 *Aſſiz.* 12 *Aſſiz. pl. Com.* *Ro. Marſh.* 1 H. 4.

That in case if any feel himself greived by execution or otherwise against right and reason, let him pursue and he shall have right: But I verily suppose, that those things which the Justices of Sewers do by their view, or by survey and discretion, are so binding as in those cases no Traverses are to be admitted, because these things are meerly the acts of the Court, and of the Justices themselves: and if they fine a man for his contempt in Court by a Record of their own view, and not upon a Presentment, the party shall not be received to Traverse this: and in Doctor *Bonhams* Case it is said, *That the act of a Judge is not Traversable, if he be the absolute Judge of the Cause; But in cases done or certified by such as be no absolute Judges of the Cause, as Commissioners of Bankrupts, which certifie one a Bankrupt he may Traverse this in an action brought,* as was done in the Case of *Cut* and *Delaber* in 7 *Jac.* in the common place, and *Vernies* Case 1 *Rep. Dier, fol.* 89. no Averment could be taken to the certificate of a Judge; and with this agreeth 7 *H.* 7. *fol.* 4.

Cut and *Delaber.* 7 *Jac.*

7 *H.*7.

But although a Traverse may be taken to a Presentment in the Court of Sewers, yet times and seasons must be observed; for if a Presentment be there made, it may be Traversed for the reasons, causes & presidents formerly mentioned; Yet if the cause have been there so far proceeded in as the Commissioners make a decree thereupon, I take it then no Traverse at all can be taken, because a decree is the final Judgement of the Court, and is an act Judicial which cannot be traversed and tryed by a Jury, for that were to refer the Judgement of the Court to be examined by a Jury, which may not be admitted; and at the Common Law, after Judgement no Traverse can be taken: And if one be Indicted at the general Session of the Peace, this is traversable; but if the party suffer himself to be Outlawed upon the said Indictment there, no Traverse lieth, but a Writ of Error: So if in our Sessions of the Sewers, the cause proceed to a decree, the party grieved is to take his way by prefferring a Bill of Reversal in maner as is done in the High Court of Chancery, and so he may have the cause here throughly examined.

Other

Other legal proceedings.

THe words of the Statute which give the legal proceedings be these (*viz.*) *That the Commissioners of Sewers may hear and determine all and singular the Premises, as well at our suit, as at the suit of any other complaining before them, after the Laws and Customs aforesaid, or otherwise, by any other ways or means*; these words give the party remedy to sue before the Justices of Sewers for such things as are contained within these Laws, and which have their dependency thereon: In *Colshils* case in *Dier, fol.* 175. the party preferred his Bill of complaint to the Commissioners, containing the effect of his Title to the Office in question, and these were special Commissioners of *Oyer* and *Terminer*: Justices of the general *Oyer* and *Terminer*, may hear and determine Usury by the Statute of 13 *Eliz. cap.* 8. yet if *I. S.* be bound in a Bond of Ten pounds principal debt, and for Forty shillings for Interest, although this Bond be for payment for usury, yet an Action of Debt doth not lie thereupon before the said Commissioners, but an information may be preferred against the lender there to punish him. *Colshils* case. 13 *Eliz.*

So by our Statute of Sewers an Action of Trespass lieth not for a Trespass done within the reach of this Commission, yet *Distinguendum est*; for put the case a sesse is laid upon a man, and the goods of *I. S.* not chargeable thereto be taken and distrained, who is not chargeable to the payment thereof, *I. S.* in my opnion (though this case have but the countenance of this Commission) may have his Action or prefer his complaint before the Commissioners in this Court of Sewers for the recovery of his damages: And although this be but a private Action, yet the Distress being taken by an authority drawn from the power of this Commission, the party distrained may have his remedy in this Court by his private Action, because it sprung by the colour of the general power of this Court.

If *A. B.* have a several Pischary in the River of *Witham*, which

which is a River within the Commission of Sewers, and the said Pischary by these Laws is chargeable to the repairs thereof, if *C. D.* disseiz him thereof, or commit a Trespasse by Fishing therein, *A. B.* can neither have an Assize nor Action of Trespasse within this Court.

So if a Royal or common River hath his current through the town of *Dale*, and one *A. B.* is tyed to repair the Banks there by Tenure, Prescription or otherwise, which notwithstanding in his default are broken down, and the waters breaking out overflow the grounds of *C. D.* thereto adjoyning, yet *C. D.* hath not any remedy to recover his damages against *A. B.* in this Court for the losse of his grounds, but he is put to his private Action therefore at the Common Law; and with this agreeth the Case of *Keighley*: But if *A. B.* be presented therefore before our Commissioners of Sewers, they may order *A. B.* to repair the breach, but cannot award damages to *C. D.* for our Commissioners of Sewers are herein like to Justices of Peace, and to Stewards of Leets and Law-days, which have power originally to meddle only with the publike wrong; Yet by the power of their Commission, and of this Statute, they many times accidentally meet with private injuries, as by the insuing cases may appear.

If a Townshipp be assessed by a Law of Sewers, and the goods of one of the Inhabitants be taken for the sesse, that party upon his complaint to these Justices of Sewers may have processe out of this Court to call before them the rest of the Inhabitants which were subject to the said sess, to cause them to contribute towards the parties damage who was solely distrained for them all, for otherwise this Court should fail of justice in his own proper materials; & the Statute of 1 *H.* 4. *c.* 12. saith, *That he which is grieved, let him have remedy*: And if the goods of a man taken for his tax or sess be sold for the payment thereof, for more moneys then his sess came to, the Justices of Sewers have power to cause the Officer to restore the overplus *Et cum hoc concordat* the Charter of *Rom. Marsh.*

1 H. 4.

If

If the Commissioners of Sewers appoint the Officers to take so many trees of *I. S.* at such a price, for the repairing of a defence against the sea, or to make a trench over the grounds of *I. D.* and thereto erect something toward these actions, *I. S.* hath remedy to come by his moneys in this Court, and the other party over whose grounds this trench is made, may be relieved in recompence to be made to him for the hurt in his grounds.

If Laborers or Workmen, as Carpenters, Masons, Smiths, Dikers, or other persons be set on work by the power of these Laws, they may by the same power recover their wages before the Justices of Sewers; for the original cause sprung out of the power of this Commission, and this is there determinable, as incident to the authority of that Court. But if the original cause did not arise out of this Commission, as in some of the preceding cases they did not, then hath this Court no Jurisdiction of the matters depending thereon: And I do ground this diversity upon the reason of the Book case put in 1 *R.* 3. *fol.* 4. where it is said, 1 R. 3.
That if the original cause do belong to the Court Christian, although in the proceedings therein some matters happen which depend on the principal, which do belong to the Temporal Court, Yet *Accessariam sequitur suum principale*, and these matters shall also be determined in the Court Christian: And so if in a cause at the Temporal Law, as in a *Quare impedit*, and in the proceedings therein, some matter do arise depending on the principal cause, which belongeth to the Court Christian, yet the Temporal Court shall continue his Jurisdiction thereof: And with this diversity agreeth *Kelleways* Kelleways Rep.
Report, fol. 110. so in our Court of Sewers, although a thing happen in the proceedings, which if it stood meerly of it self would not pertain *ad cor' examen*, notwithstanding if it be but a matter accidental, and have his dependance upon a principal matter which is determinable in this Court, the other also shall be here determinable.

Exemptions.

Exemptions.

IT may be a grand queſtion, Whether theſe Laws of Sewers will permit any Exemptions to any perſon or perſons, and by the ſtrict penning of the words of this Commiſſion it ſeems to oppoſe all ſuch priviledges and diſcharges, as Exemptions be; The ancient Commiſſion which is in the Regiſter, and in *Fitz. Nat. Br.* are exceeding ſtrict, for the words therein be, *Ita quod aliquibus tenentibus terrarum ſeu Tenementum ſeu communiam paſturæ ſeu Piſcharia habentibus diviti vel pauperi vel alteri cujuſcunq; fuerit conditionis Status aut dignitatis qui defenſion' habere potuerint per predict' Willam Cuturin Foſſata fuerus pontes caleeta & gurgites ſeu etiam damnum per trencheas predict' ſuſtinent vel poterint ſuſtinere ſive fuerint infra libertates ſivè extra non parcantur in hac parte*; And the words in our Statute be in effect, *And all ſuch which reap profit or ſuſtain damage, ſhall be aſſeſſed*; which words ſeem not to admit of diſcharges. Yet in my opinion out of the ſtrict words of theſe Commiſſions there be ſome Exemptions, though not expreſſed in words, yet ſupplyed in reaſon, and are to be added in conſtruction.

1. Firſt, for the grounds lying betwixt the Seabanks and the Seas are in reaſon exempted from the charge of the Banks and Walls, becauſe they can take no ſafety thereby.

2. Secondly, thoſe grounds which be upon an aſſent, and not on the Level, are alſo by the rule of reaſon exempted from aſſeſſes to be impoſed only by the power of theſe Laws.

3. Thirdly, where one or moe be tyed to repair a Bank, Wall or other defence by Cuſtom, Preſcription, Tenure or otherwiſe, all others be in Law and reaſon exempted.

4. Fourthly, a Parſon & Vicar with cure are not to be aſſeſſed for their Tythes, and divers of the Hereditaments formerly mentioned in Aſſeſſes be by the rule of reaſon exempted.

5. Fifthly, but whether one may be diſcharged and exempted from the repairs of the works of Sewers by any ſpecial Cuſtom or Preſcription, is a great queſtion of our caſe, in regard both the old and new Commiſſions *Quod nul-*

lus

lus in hac parte parcatur ſeem to Toll all Preſcriptions and Cuſtoms of diſcharge, and to admit of none of them: And the Charter of *Romney Marſh pag.* 31, 32, and 33. beareth the ſame expoſition; for there *Godfrey* pleaded a Plea to diſcharge him of the repairs of the Walls and Watergauges, becauſe he claims his Lands by Charter from the King, and alſo preſcribed generally *in non reparando*, but he durſt not abide his Plea; for there *pag.* 39. it is ſaid, *That all having Lands ſhould contribute, and that none might be ſpared*; and alſo *pag.* 53. be theſe words, *Quod ſtarent ordinationi Jurator' predict' nulla conſuetudine reſiſtente*; which words be direct in the point againſt ſuch general diſcharges claimed by blinde cuſtoms: Yet I have been credibly informed, that Sir *George Fitzwilliams* Knight, had a Cuſtom in his Town and Manor of *Mabblethorp* in the County of *Lincoln*, called *Swiftage*, whereby he challenged to be freed from being charged to the repairs of the Seabanks, becauſe in conſideration thereof he and his Anceſtors have uſed in regard of their Manor there to do ſome other repairs as beneficial for the Commonwealth; and in my opinion, in ſuch a ſpecial Cuſtom one may be exempted; like to the caſe of Tithes, wherein one could not by the Common Laws preſcribe in a *non decimando*, yet in a *modus decimandi* he may, becauſe there is ſome competent conſideration given in lieu thereof; And ſo in my opinion one cannot generally preſcribe or alleage a Cuſtom to be freed and clearly exempted from the repairs of Sewers, but by ſpecial Cuſtom he may, as in the ſaid caſe of ſir *George Fitzwilliams*.

And therefore the Commiſſioners of Sewers in my caſe did very juſtly and diſcreetly refuſe the ſaid general pleas of diſcharge tendred to them by *A.* and *E.* and ſo I *ſuper totam materiam* conclude my Argument as I did my Caſe, That the Commiſsioners of Sewers did adminiſter true Juſtice in all the parts of theſe Laws.

Finis hujus tertiæ Lecturæ.

Lectura quarta.

IT appeareth by this Statute I read on, that the Law makers made it not the leaſt part of their care to have ſuch perſons put in truſt with the execution thereof, as ſhould be of great wiſdom and approved experience. And becauſe that perſons of profound wiſdoms, deep Experience, tryed Learning, generous Diſpoſition, and of good Eſtate, ſhould be put into theſe Commiſſions of Sewers, the Statute did make choice of four Honorable perſons to have and take the nomination of ſuch as ſhould for their Integrity, Learning, Wealth, Wiſdom and Expetience, be worthy to be put into this Commiſſion. And therefore the Lord Chancellor, Lord Treaſurer, and the two Lord chief Juſtices for the time being, have by this Statute the nomination of our Commiſſioners; But as theſe great perſons of Honor by their high places are moſt commonly buſied in matters of great importance, they many times refer theſe matters to others, by means whereof divers perſons in ſome countreys have of late years crept into Commiſsion, which this Statute doth not allow of, which do not only want knowledge and experience, but which are alſo tranſported and carried away with ſelfwill, and ſerve moſt commonly to make a faction of the greater number to carry away buſineſſes, when the graver and wiſer ſort are forced (being overladen with popular voices) to give way to run into contrary courſes, and are made to ſurceaſe from making good and wholſom Laws and Ordinances, and ſometimes are as it were forced to agree to thoſe

which are whose; even as the Roman Dictator *Fabius* having joyned to him the froward *Minutius*, was by the violent ſtream of his colleague ſo croſſed and overſwayed, not out of judgement, but ſelfwill, that he was forced to give way to *Minutius* frowardneſs, though it tended almoſt to the hazard and the overthrow of the whole Roman Army: And becauſe the Commiſſioners are the perſons through whoſe hands the execution of all theſe Laws muſt paſſe, I thought it therefore very convenient to take into examination this part of the Statute which touch and concern them: And I intend to purge the Commiſſion of ſuch of them as theſe Laws have diſalowed, and to that purpoſe I have framed this inſuing caſe, which I take it will give us occaſion to call them all into queſtion, and to ſevet the juſt from the unjuſt, the ſufficient from the unſufficient, and the learned from the illiterate.

The Caſe.

A. demiſeth to *B.* and *C.* Land of the yearly value of Sixty pounds *cum ſtauro* of the value of Two hundred pounds for their lives, the Remainder to *D.* a free Citizen of *Lincoln*, *B.* and *D.* diſſeiſe *C.* of the Land and take the ſtock, *C.* releaſeth to *D.* the goods abſolutely, and the Land upon Condition; *D.* dieth in Exile, *E.* his ſon and heir enters, *B.* and *C.* who enter for the Condition broken, *E* and *Francis* Countes Dowager of *Warwick*, and three other Commiſſioners of the *Quorum* of Sewers, make a Law to raiſe a Were, erected upon a River navigable at the coſts of the party, becauſe it hindred the current of waters.

My concluſion is, That here be competent Commiſſioners in number and in Eſtate which made this Law, and that this Law is well decreed within this Statute.

The caſe I do diſtribute in theſe points, *viz.* Three at the Common Law, and four upon this Statute; the points I intend by the Common Law are theſe:

First,

First, whether the Sixty pounds ſtock can be demiſed and letten for life, with the Remainder over, as this caſe is. 1.

Secondly, whereas *B.* and *C.* be two Joyntenants in poſſeſſion, whether one of the Joyntenants and a ſtranger can ſo diſſeiſe the other Ioyntenant as to transfer thereby an intereſt and Eſtate to the ſtranger. 2.

Thirdly, becauſe the Releaſe dependeth upon the diſſeiſin, the queſtion is, in what maner it doth inure, and whether it ſhall expel *B.* out of that moyety, becauſe it is made to the ſtranger; and then what is reduced by the Condition, whether a poſſeſſion, action, or a right. 3.

Points upon this Statute.

First, whether the Son of the free Citizen exiled is a diſabled Commiſſioner, in reſpect of his perſon; and whether he hath ſuch an Eſtate, either in Lands or goods, as will ſatisfie this Law. 1.

Secondly, whether the Counteſs may be a competent Commiſsioner within this Statute. 2

Thirdly, whether a joynt intereſt in Lands or goods will make the Ioyntenant a ſufficient inabled Commiſsioner within this Statute. 3.

Fourthly, whether the Were, as this caſe is, be raced down or not. 4.

And hereupon I intend to lay open the whole diviſion, touching the Lets, Impediments and Annoyances which this Statute ſpeaketh of.

Argumentum Lectoris.

I meant it not for a point in this caſe, whether goods might be let with Land, nor whether a ſtock might be leaſed with a Farm, becauſe I finde the Books of 1 *H.* 6. 1. and many others full in the point that they may. And although by the taking of them back again by the Leſſor they will thereby ſuſpend no rent, yet in the original demiſe they may be a cauſe to increaſe the rent: but my point herein is double.

First, whether they will paſſe in Remainder, as my caſe doth limit them. 1.

Secondly,

2. Secondly, whether they will inable *B.* and *C.* to be Commissioners of Sewers alowed by this Statute.

I do not onely finde stock let with Farms, but also joyned in Real actions with Land: for in the Writ of Assize the words be, *Quod vicecomes faciat Tenement' illud reseisiri de catallis quæ in ipso capta fuerint & ipsum Tenement' cum catallis esse in pace usq;, &c.* These doubtless were such goods as stocked the grounds, and which usually went with the same, for in ancient times when any farmed grounds, they usually farmed the stock thereon going, and this appears by ancient presidents; *Sed nunc aliud tempus.*

In the Writ of *Ejectione firmæ* in the Register be contained these words, *Ostensum quare vi & armis manerium de Dale quod C. prefat' A. dimisit ad terminum qui nondum preteriit intravit & bona & catalla ejusdem A. ad valentiam, &c. in eodem manerio inventa capit & asportavit.* So that in those Writs of Assize and *Exjectione firmæ*, the one to recover the Freehold, the other the Leasehold: We finde goods which went with the Manor or Farm made parcel of the plaint, and I take it, damages shall be increased therfore, for these were such goods as stockt the Farms. And in *Wrotsly* and *Adams* Case in *Plo. Com.* Exception was taken in abatement of the Writ, because the words (*bona & Catalla*) were left out of the same: Yet in my opinion, no estate, neither *in presenti* nor in remainder can be made of Goods or Cattel, neither shall they go with the Land in point of Estate, but shall passe to the Lessee, and after to him in the remainder, as a dependancy upon the Farm: And the Heir shall have Heir-looms, together with the Mansion House, as things necessary concurrent therewithal, yet the Heir-looms have no descending qualities, but they do go with and wait upon the house, as necessary Instruments fitting to be used therewith; neither can it be gathered by the Book of *37 H. 6. fol.* 30. that the Book called *The Grail* (which was devised by will to *A.* one of the executors to have the occupation during his life, the remainder thereof in like maner to *B.* for his life, and after to be disposed

Wrotsley and *Adams* Case.

37 H. 6.

poſed by the executors to the Churchwardens of *Dale*) that it did paſſe to *A.* and *B.* in point of Eſtate, but only the uſe and occupation thereof was diſpoſed to be ruled according to the ſaid Limitations, but the property remained in the executors.

So in *Paramore* and *Yardleys* Caſe in the *Com.* and in *Matthew Mannings* Caſe in *Cooks Reports*, a Term of years could not be deviſed to *A.* for life, the Remainder thereof to *B.* for his life, to paſſe in this maner in point of Eſtate; neither could theſe Eſtates be made thereof, but by conſtruction the ſame was diſpoſed of to go by way of executory deviſe; and ſo the ſtock in my caſe was not transferred in point of Eſtate with the Land, but in point of executory diſpoſition of the Occupation and uſe thereof onely; and therefore if one let a ſtock of cattel or ſheep with grounds at the end of the Term, the goods as acceſſary with the Land as principal ſhall return to the Leſſor, and during the Term the Leſſor hath the property of them, and the Leſſee the poſſeſſion thereof, and the Leſſee ſhall have the yearly profits thereof for his Rent; and here I do end this firſt point, and will proceed to the reſt. *Paramore. Yardleys caſe. Mannnings caſe.*

The ſecond Point.

There be two Joyntenants, and one of them and an eſtranger do diſſeiſe the other; what intereſt the ſtranger gaineth thereby is the queſtion.

I am clear of Opinion, as many books be; That one Joyntenant may diſſeiſe his companion by an expreſſe *Ouſter*, but when a ſtranger joyneth therein, in what part that doth alter the caſe is the matter; for if the ſtranger ſhould get a joynt Eſtate in poſſeſsion with the Joyntenant whom he joyned withal, that were to make a double Joyntenancy *in uno eodemq; gradu*: for the Joyntenant which committed the diſſeiſin, which hath the poſſeſsion, and the Joyntenant which was diſſeiſed and which hath the right, do hold Joyntenancy ſtill; for by *36 Ed. 3.* right may hold Joyntenancy with a poſſeſsion, and the one may take by ſur- *36 Ed. 3.*

ſurvivor from the other, in 9 *H.* 7. *fol.* 23. That he in Remainder and a ſtranger may diſſeiſe Tenant for life, and ſhall be both diſſeiſors; but in that caſe they were both ſtrangers to the particular Eſtate: Alſo it is manifeſt that one Ioyntenancy may be built upon another, As if two Joyntenants be diſſeiſed by other two Joyntenants of the right *ſemel*, but not *ſimul*: But in our principal caſe, Whether one Ioyntenant might hold the poſſeſsion of a Moyety with his firſt companion in Ioynture, with his moyety in right, and can alſo *uno tempore* hold Ioyntenancy in poſſeſsion with a ſtranger, of the moyety upon which the diſſeiſin was committed, I ſuppoſe he cannot, becauſe then he ſhould hold partnerſhip with both of one thing: And therefore in my opinion the ſtranger getteth nothing in my caſe, but is onely a Coadjutor, and no Diſſeiſor, which gets the Tenancy.

The third Point.

But admit the ſtranger did get a moyety of a moyety by joyning in the diſſeiſin, then what alteration this releaſe will work in my caſe is the next queſtion.

Littleton. It is true as Mr. *Littleton* ſaith, That if there be two Diſſeiſors, and the Diſſeiſee releaſe to one of them, he ſhall hold his companion out of all, the like Law is in my caſe of two abaters and two intruders: but if two diſſeiſors be, and they make a Leaſe for years, rendring Rent, and then the Diſſeiſee releaſeth to one of the Diſſeiſors, I ſuppoſe this releaſe ſhall inure to both, becauſe the Leſſee for years, whoſe Eſtate ſhall be ſtrengthned by this releaſe, is in by the Title under both of them, and now they are Tenants of a Reverſion onely, and of a Rent thereto incident, which was not got by the diſſeiſin, but was compoſed by the Legal contract of the parties.

So if two be admitted to a Copyhold by Tort, or to an Office in a Court of Juſtice unlawfully, though their entry be unlawful, yet becauſe they came in by admittance, which is at the door of Juſtice, I ſuppoſe therefore, that if a releaſe be made to one of them by the diſſeiſee, it ſhall inure to both,

both, becauſe they had ſome colour and countenance to enter, more then expreſſe diſſeiſors or intrudors have.

But if a Son and a Stranger diſſeiſe the Father, and after the Father dyeth, and the right deſcend to the ſon, by this releaſe in Law, and by the acceſſion of the right by deſcent to the tortious poſſeſſion, it doth inure only to the ſon; and although this releaſe was upon condition, which by the breach thereof ſeemeth to ſet the Releſſor in the ſame ſtate he was before, yet it doth not admit the Joynt diſſeiſor which was expelled thereby to become a copartner again with his fellow: As if the ſon and a ſtranger diſſeiſe the father, and the father dyeth, the ſtranger hereby is expelled by the deſcent of this right to the ſon; yet if after a more near Heir is born, as the Elder brother dyed his wife Enſent with a ſon, which after the deceaſe of the Grandfather is born, whereby the Inheritance of this Land is his, yet the other Joynt diſſeiſor which was expelled by the deſcent of the right of his fellow diſſeiſor, by the departure of the right with the poſſeſſion, cannot enter upon his fellow diſſeiſor, in my opinion.

But now the queſtion is further, what is reduced by this condition, the right only which was releaſed, or the poſſeſſion together with this right; for if but a right be reduced, then a deſcent happning may perchance Toll the entry of the Releſſor, and ſo he may be put to his Writ of right in Fee; And if it be a right of an inferior degree, as in our caſe it was but for life, then he ſhould be without remedy.

But in my opinion where the releaſe doth inure by way of entry and Feoffment being upon condition, it may in that caſe by the breach of the condition reduce the poſſeſſion, and give the Releſſor a Re-entry, becauſe in *Intelligentia legis* the Land was paſſed thereby, and not a right only; But if it had inured by way of *Mitter le droit* only, I take it then it would reduce but a right; But in our caſe I ſuppoſe if it had had any working at all, it was by Entry and Feoffment; yet I think nothing did inure thereby to the ſtranger, which in my caſe is called *D.* becauſe

17 *Aſſiz. pl.* 2. 17. *Ed.* 3.

Bevils Caſe 4 *Reports.*

he wanted the Freehold whereupon it ſhould inure.

And ſo I end my Common Law points, and I will now in hand with my Statute.

The parts of the Statute whereupon I do ground my ſubſequent matters, doth contain in it theſe words (*viz.*) *That if any perſon or perſons of what Eſtate or Degree ſoever he or they be of, that from henceforth do take upon him or them to ſit by vertue of the ſaid Commiſſions, not being firſt ſworn according to the Tenor of the Oath expreſſed in the Statute; or if any perſon ſo named and ſworn do ſit, not having Lands, Tenements or other Hereditaments in Fee ſimple, Fee tail, or for term of life, to the clear yearly value of Forty Marks above all charges to his own uſe, Except he be Reſciant and Free of any City, Borough or Town Corporate, have moveable ſubſtance of the clear value of One hundred pounds, or elſe be learned in the Laws of this Realm, in and concerning the ſame; That is to ſay, admitted in one of the principal Inns of Court for an utter Barriſter, ſhall forfeit Forty pounds for every time that he ſhall attempt ſo to do, the one moyety to the King, the other moyety to the party that will ſue therefore*, &c.

So that by this clauſe it is manifeſt, that every one that is not qualified in one of theſe degrees, is no competent Commiſſioner within this Statute.

1. First, that he be an utter Barriſter in one of the four Inns of Court.

2. Secondly, or have Lands, Tenements or Hereditaments of the clear yearly value of Forty Marks above all charges, in Fee ſimple, Fee tail, or for life.

3. Thirdly, or be Free or Reſciant in ſome City, Borough or Town Corporate, and have moveable ſubſtance of the clear value of One hundred pounds.

And that perſon which is not within one of the ſaid three parts, and yet doth take upon him to ſit in the execution of this Commiſſion, incurs two penalties:

1. The one, the forfeiture of his diſcretion for his preſumption.

2. The other, of Forty pounds for his contempt.

And

And therefore for the more clear examination of these things, I will observe that method in my Argument, which my Case hath formerly prescribed to me.

And first of all, I shall proceed to the personal abilities, and first of the son of the free Citizen of *Lincoln*, I am of opinion, that every Commissioner of this kinde must be indowed with these three qualities. 1.

First, he must be free of a City, *&c.* 1.
Secondly, he must be there Resciant, and 2.
Thirdly, he must have in clear moveable Substance, One hundred pounds; and 3.

If he want any of these, then he is out of this Branch of this Statute.

Therefore what person is such a Freeman, is now to be handled.

I am of opinion, that every Subject born within the Kings Dominion is a Freeman of this Realm, as appeareth by the Grand Charter, *cap.* 14. yea though he be a Bondslave to a Subject, but a stranger born is no Freeman of the Kingdom, till the King have made him Denizen, in whose power alone, without the help of any other, one may be made free: And to be a Freeman of the Realm, the place of his birth is held more material then the quality of his Parents; for if Aliens have a childe in *England* it is free of the Kingdom: yet by the Opinion of *Hussey* Chief Justice in 11. 3. *fol.* 4. and in *Calvins* case of the *Post Nati*, it is holden for Law, That if Ambassadors of this Realm have children born in *France*, or elsewhere where the Father and Mother be natural born Subjects, the children are free of the Realm of *England*; but if either the Father or the Mother of such children were an Alien, then are not those children free. One out of the Kings protection, is, as I take it, for that time no Freeman of the Realm: But in what case a man Exiled is in, forteth the neareſt to our question.

Exile is one of the Eight Punishments which the Roman Laws did inflict upon Strangers, which be *videlicet*,

1. *Damnum.*
2. *Imprisonamentum.*
3. *Plaga.*
4. *Compensatio.*
5. *Ignominia.*
6. *Exilium.*
7. *Servitudo.*
8. *Mors.*

Mr. *Bracton* doth in this maner describe Exile, that is, *Certi loci interdictio*, and doth distribute it into Four heads; That is to say,

1. *Specialis, hoc est interdictio talis provinciæ Civitatis Burgi aut villæ.*

2. *Generalis, Interdictio totius Regni & aliquando est.*

3. *Temporaria, pro duobus tribus quatuor aut pluribus annis aut, &c.*

4. *Perpetua, pro termino vitæ & Exilium est aliquando ex arbitrio principis sicut in exiliando Duces Hertfordiæ & Norfolciæ per Regem Richardum secundum, Et aliquando per Judicium ut servetur fit in casu Piers de Gaveston ex etiam in casu Hugonis de Spencer junioris qui ambo fuerunt exulati per Judicium in Parliamento.*

Abjuration also was a legal Exile by the Judgement of the Common Law, as also by the Statute Law, and in the Statute of *Westminster the Second*, Cap. 25. He which is vis both a Ward, and cannot render the Ward unmarried, or the value of his Mariage, must abjure the Realm; and this is a general Abjuration: And by a Statute made in 31 *Ed.* 1. Butchers are to be abjured the Town, if they offend the fourth time in selling measled flesh, and this is a special Abjuration. 31 Ed. 1.

But I must put this Case for a further question, which is, What a man Exiled doth forfeit thereby? And in my opinion he forfeits these things following;

1. First, he loseth thereby the freedom and liberty of the Nation out of which he is Exiled.

Secondly,

Secondly, he forfeits his Freedom in the Borough or City where he was free, for he which forfeits the Freedom of the whole Realm, by consequence forfeits his Freedom in every part thereof. 2.

Thirdly, he is of as little esteem in our Law as if he were dead, for his Heir may enter, and so may his Wife enter into her own Lands, and may sue an Action as a woman sole, by 31 *Ed.* 1. & 1 *H.* 4. 3. 31 *Ed.* 1. 1 *H.* 4. 1.

And fourthly, in my opinion he shall forfeit those Lands to the King, which he shall purchase in the Realm during his Banishment, *quod vide* 15 *Ed.* 3. *Fitz. Pethim' plac.* 2. But there in that case *Hugh Spencer* was banished by a Judgement in Parliament, which gave a forfeiture of his Lands; howsoever I take him as strongly barred from purchasing in the Realm during his Banishment, as an Alien is, for *sit alienigena* by his Banishment, and he is in a worse case then an Alien, because he taketh with him *Indignatio principis*: But a banished man forfeits neither Title of Honor, as Knighthood, which is *de jure gentium*, nor the Lands he had before he was Exiled, unless by special Judgement given in a legal course they be so decreed. 4.

Then our case goes further, That *E.* is not Exiled himself, but *D.* his Father was Exiled, whose Heir *E.* is: now whether by the Exilement of the Father, the liberty and freedom which *E.* might claim in the City of *Lincoln* by being the Son and Heir of a Freeman, be forfeit for his Fathers Banishment, or not, is the matter of my Case.

A Freeman of a City or Borough may be made divers maner of ways, as appeareth in the Case of the City of *London* in Sir *Edward Cooks* 8 *Report*, *fol.* 126. That is to say,

First, by Service in his Apprentiship. 1.

Secondly, by Birth, by being the Son of a Freeman. 2.

Thirdly, by Purchase, and that is by the Common Counsel of the City. And at *Bristol* by Mariage. 3.

In the Chronicles in the Raign of *Richard* the 2. it is said, *Freedom was obtained but by two means*, videlicet, *by Service, and by Birth*, yet it seems it may be obtained by purchase, because

because the Centurion claimed his Freedom thereby in the
Acts 22. 8. 22 Chapter of the Acts of the Apostles. In the *Irish Reports, fol.* 12. it is said, *That one may be a Freeman by Birth, Mariage and Service:* Saint *Paul* indeed was born at *Tarsus* in *Cicilia* which was under the obedience of the Romans, he challenged therefore to be a citizen of *Rome*; but I take it the text there took it but to be National Freedom, which is such a general Freedom, as *Calvin* being born in *Scotland* claimed & had in *England*, because he was born under the obedience of the King of *England*; But that made not Saint *Paul* Free of the private Customs, Priviledges and Franchises of *Rome*, no more then *Calvins* birth made him a free Citizen of *Lincoln* to the peculiar Customs of that City.

If one be born in a City of Parents that are not free, the childe hereby is no Citizen by birth; and if one be born of Free Parents out of the place of Priviledges, as out of *Lincoln*, he yet is a Freeman by Birth: Yet in the Charter Grant of *Yarmouth* the words were, *Concessimus Burgensibus de Magna Yermutha de villa predict' oriundis*, that they should have such Liberties and such; so that it may be the special words of the Charter may alter the case: yet in
Cooks 8 Rep. the case of the City of *London*, *Cooks 8. Report*, the King by his Letters Patents could not make one a Freeman of *London*, yet he may thereby make him a Freeman of the Kingdom.

But whether those that are Free by Birth, Service or Mariage be Freemen within my Statute, or not, is a question; because the words thereof be *absolutè posita* to all purposes: And therefore I take it, that this Statute intends it of such as have challenged their Freedom, and which have taken the Freemans Oath, and are admitted into the Society and fellowship of the Freemen, Citizens and Burgesses; for in *Fames Bags* Case in the 11 *Rep.* such a one is taken for a perfect Freeman, and no other: So in my opinion *E.* the son of *D.* is no competent Freeman of the City of *Lincoln* within the branch of this Statute; But admit he were, then it may be objected to me, that by the Exilement of the father

ther the Freedom of the ſon was forfeit, by reaſon he was by this Exilement become no free Citizen. But in anſwer thereunto I ſay briefly, That if the ſon had attained this Freedom by the death of his father, as a thing deſcendible, then it had been forfeit by his fathers Baniſhment, but the ſon had this Freedom by his own birth, as a purchaſe, and not by the death of his father by deſcent, *Ergo*, it was not forfeited by his fathers Exilement. Like to the caſe where *I. S.* hath many children, and then he confeſſeth himſelf Villain to *I. D.* in a Court of Record, yet his children formerly born are Freemen and no Villains, becauſe they were free by their own births, but the Inheritance is inthralled, becauſe it is to come to the Heir by deſcent: So that I am of opinion, that if *E.* had otherwiſe been a competent Freeman, as he was not, then the Exilement of his father could not have diſabled him.

Our Freeman which this Statute ſpeaketh of, muſt not only be Free of the City or Borough, but he muſt alſo there be reſciant, for theſe words are materially placed in the ſaid Law, and here *E.* was the ſon of *D.* a Free Citizen of *Lincoln*, who did there reſide and dwell, and every childe is part of the fathers family, for the Husband and Wife, Father and Children, Maſter and Servant are of a Family, and a Ward is part of his Gardians family: But in our caſe when *D.* was Baniſhed, he then forewent his local Habitation, and ſo his ſaid ſon could not then be of his family, nor could be intended to dwell with him who had no Habitation in the Realm: And I am of opinion, that this Statute requireth an actual habitation or reſciancy, and not a Mathematical or Imaginary reſciancy, ſuch a one as was in *Geffries* Caſe in *Cooks* 5 *Report*, for there the caſe was, *That one did perſonally and locally dwell and reſide at* Dale *and occupied Lands in* Sale; here the party was in Law, but not in fact, an Inhabitant in *Sale*, and was there aſſeſſed as an Inhabitant to the repair of that Church; But this Commiſſioner of ours is bound to ſuch reſciancy as a Miniſter is to his reſciancy, which in *Butler* and *Goodhals* Caſe in. *Geffreys* Caſe.

in *Cooks Report* ought to be locally and personally abiding in the Parish where his Parsonage or Vicarage house is, for residency or residency have a like signification, and be both of them words of that efficacy, as they tie a man to his personal and actual abode and habitation with their family: But put the case that in *Lincoln* there be places exempt out of the Freedom of the City, and yet within the Circle of the Walls, as Saint *Martins* doth in *London*, I take it if a Freeman dwell there, this is no residency intended within this Statute, because the words of our Law be, *That he be Resident and Free of the City*, which going together draweth his Habitation to the place where his Freedom is. And with this agreeth the Decree made for *London* touching Tithes in *Anno Dom.* 1535. which did not extend to Saint *Martins*, because it was In but not Of *London*, Doctor *Graunts* Case, *Cooks* 11 *Report*.

Our Freeman must also have in clear moveable substance to the value of a hundred pounds, this word (*Substance*) would have extended as well to ones real Estate as to his personal, if it had gone alone; but being coupled with the word *Moveable*, declares plainly that it onely extends to the personal Estate. And I take it, that these words (*Moveable substance*) doth not onely contain and extend to such things *Quæ de se movere possint*, as live goods, Horses, Oxen, Sheep, and such like, but also to such things *quæ de se movere non possint*, as Plate, Jewels, ready money, Utensils of house, Mercery, Drapery, and other wares and goods of value, Hay, Corn, goods of Husbandry, and Housewifery, but Birds and Beasts of Parks and Warrens, and Doves in Dovehouses, be not valueable sustance; a Hive of Bees, and a Villain for years, and a Captive taken in the Wars be, for there shall be paid for him a Ransom, as is mentioned in the *Register*, *fol.* 102. Moneys due upon Statutes, Judgements, Recognizances, Bonds, Bills or Contracts, be not valueable substances within this Statute; for by this Statute it must be clear, and not doubtful or accidental, as Moneys out of hand be, which is like to a Bird in the Bush, yet these be all

valueable

valueable, and are valued in Inventories taken in the Eccleſiaſtical Courts. But yet the Executors or Adminiſtrators ſhall not be charged for aſſets for them, till they have received them: And in 25 *H.* 8. in *Dier, fol.* 5. Obligations are not held valuable, but things in action, and if one have got goods by tort and wrong to the value of One hundred pounds, yet this is clear valueable ſubſtance within this Law; for although the word *clear* be inſerted into the Statute, yet that relates to the value, and not to the title of thoſe goods: And if one have goods as Executor or Adminiſtrator, theſe are not his own, and therefore do not inable him to be a Commiſſioner within this Law. 25 *H.* 8.

Neither do the goods of the Church inable the Parſon, Vicar or Curate, nor the goods of a Corporation do not inable the Major and Aldermen, or Citizens of a City, or Town Corporate, for theſe do not belong to theſe particular perſons, neither did this ſtock in my caſe, which is demiſed to *B.* and *C.* make them competent Commiſſioners within this Statute, becauſe they had not the property therein, but onely the uſe and occupation thereof.

And although in this Statute it is not declared in what place theſe goods which ſhould inable a man to be a Commiſſioner of Sewers ſhould be in, it will ſuffice if the party have them in any place within the Realm, for this very Law calls them *Moveable ſubſtance*: And herein I conſider my Free Citizen, and in my opinion *E.* had neither Freedom in his perſon, nor real Eſtate in Land, nor moveable ſubſtance in any ſort to make him a competent Commiſſioner within this Law; yet if a Freeman be deſtitute of goods, or want perfection in his Freedom, if notwithſtanding he have Lands to the value of forty Marks *per annum*, then he ſhall be allowed a Commiſſioner within this Statute: Touching which point of Lands I now intend to proceed in.

In the handling of this matter it is to be conſidered, which be Hereditaments within this Law; for the other two words *Lands* and *Tenements* need no expoſition; wherein I am of opinion, That Meſſuages, Cottages, Tofts, Crofts

in *Cooks Report* ought to be locally and personally abiding in the Parish where his Parsonage or Vicarage house is, for residency or residency have a like signification, and be both of them words of that efficacy, as they tie a man to his personal and actual abode and habitation with their family: But put the case that in *Lincoln* there be places exempt out of the Freedom of the City, and yet within the Circle of the Walls, as Saint *Martins* doth in *London*, I take it if a Freeman dwell there, this is no residency intended within this Statute, because the words of our Law be, *That he be Resident and Free of the City*, which going together draweth his Habitation to the place where his Freedom is: And with this agreeth the Decree made for *London* touching Tithes in *Anno Dom.* 1535. which did not extend to Saint *Martins*, because it was In but not Of *London*, Doctor *Graunts* Case, *Cooks* 11 *Report*.

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In the Handling of this matter it is to be conſidered, what be Hereditaments within this Law; for the other two words *Lands* and *Tenements* need no expoſition; wherein I am of opinion, That Meſſuages, Cottages, Toft,

Crofts, Houſes, Land, Meadow, Paſture, Feedings, Moors, Mariſhes, Heaths, Furs, Mills, Orchards, Gardens, Hopyards, Rents of Annuities, *Prima veſtura terræ*, Piſcharies, Tythes, Penſions, Portions, Proxies, Parks, Warrens are all of them Hereditaments within this part of this Law, for the word *Hereditament* is a word of the larger ſize and largeſt extent in our Law, being *Omne quod Hæreditari poteſt*; and yet every Hereditament is not within this branch, for it hath two other words joyned therewithal (*videlicet*) *yearly value*: And therefore Franchiſes and Liberties, as Waifs, Strayes, Felons goods, Deodans, Fines, Amerciament, Profits of Courts, Fairs, Markets, Ferries, Hundreds, Leets, and ſuch like, are all of them out of this Statute in this point, becauſe they be not of a certain yearly value, but be accidental and depend in contingency, by the opinion in *Butler* and *Bakers* Caſe *Cooks* 3 *Report*; But as it is there ſaid, *If theſe things have heretofore been uſually letten and demiſed for certain yearly Rents, then they may be Hereditaments of clear yearly value within this Law.* All Offices and Vocations, as Phyſitians, Chyrurgions or Trades, as Merchants, Mercers, Grocers, Drapers, and ſuch like, be neither Hereditary, nor of certain yearly value, and therefore they be not within this Law, though perhaps one gain thereby Five hundred pounds *per annum*. Alſo dry reverſions or remainders depending upon Eſtates for lives are out of this branch, for the words of the Statute be (*having*) which is in *præſenti* and not *future*.

Neither is an Advowſon of force in this point, though it be aſſets in a Formdon, yet it is no aſſets in an Action of debt brought againſt Executors; Homages, Fealties, Eſcuages, Heriots, Reliefs, *Nomine panes*, and ſuch like, be Hereditaments, but becauſe they are not of yearly value, they are not therefore within this Law.

Alſo if a Commiſſioner of Sewers be ſeiſed of a Rent or Annuity payable every ſecond year, it doth not inable him to ſit becauſe it is not Annual, which is intended yearly, and every year, as the Pryor of *Plymptons* Caſe in

Dier,

Dier, fol. 133. is, but if one do grant to *I. S.* an Annuity or Rent of Forty Marks in Fee, payable at the feast of *Easter* yearly, if the granted will then come for it to such a place, is of certain yearly value within this Law.

But put the case that *A.* is seised of Land in Fee, and grant to *B.* Forty Marks *per annum* for his life only; I am of opinion that *B.* is no sufficient qualified Commissioner within this Law.

But if *A.* be seised of a Rent of Forty Marks *per annum* in Fee, and he grant the same to *B.* for his life, he is a competent Commissioner within this Law *differentia apparet.*

Our Statute goeth on in these words, *That the Commissioner which would sit without exception, must have in Lands, Tenements or Hereditaments of the clear yearly value of Forty Marks to his own use*; Therefore a man seised of Lands to that value in the right of his wife, although he take the Rents and Profits to his own use, yet this will not inable him to be a Commissioner within this Law, but he must have them *in ejus usu & ad ejus usum.*

A Feoffee to a use before the Statute of 27 *H.* 8. of uses, was no competent Commissioner within our Statute, for he had the Land then to another mans use; Neither was *Cestui que use* sufficiently qualified to be a Commissioner.

Two Tenants in common, or coparceners of Forty pounds Lands *per annum* are neither of them of sufficient ability to be Commissioners within this Law.

And the like Law is of two Joyntenants of Land of that yearly value, for though they be seised *per my* and *per tout*, yet in truth, and in a legal construction, either of them be seised but of a moyety: So that if two Joyntenants, Tenants in common, or coparceners be seised of Lands of the yearly value of Threescore pounds, either of them may sit by this Commission.

A Dean and Chapter, Major and Commonalty, Master of a Colledge and Fellows, which be seised of Lands and Tenements of the yearly value of a Hundred pounds *per annum* are not in respect thereof to sit.

If a Bishop, Dean, Chancellor, Archdeacon, Prebend, Parson or Vicar be seised of Lands in *Jure Ecclesiæ* of the clear yearly value of Forty Marks, I suppose these may sit Commissioners by this Statute, for they have these Lands *in eorum usu* during the time they continue in their places, which in intendment of Law is for their lives, but yet by the intendment of Law they are not to sit in the execution of any humane affairs, and therefore seeing their persons are out of the intendment of this Law, so likewise should their Church livings be: but this is but a conceit, for although they be not persons *having* these Lands within the Statute of 32 H. 8. of Wills, which is a having to dispose, yet they may be within our Statute, which is a having to retain.

If an Executor have a Villain for years which purchaseth Land of Forty Marks *per annum*, he may sit in the execution of this Commission, for till his Lord enter he hath them to his own use, but if the Executor enter, then neither the Villain nor Executor can sit a Commissioner by this Law.

If an Alien purchase Lands of sufficient value in Fee, he in respect of his person is a disabled person to sit, neither is he a person having Lands, because he is not seised thereof to his own use, but to the use of the King; But if he be made a Denizen, then in his person he is made capable.

The Warden of the Fleet who hath Lands belonging to his Office, may in respect thereof sit w Commissioner by this Law.

But shall a Termor or Lessee for years of Land of good value be thrust out of Commission, and be counted neither a sufficient Landed man, nor his Term and Lease to be accepted moveable substance, and not only so, but that his Farm shall be a further disablement unto him, as the Statute of 13 *El. cap.* 9. seemeth to purport, the words of which Statute be, *That no Farmer or Farmers for Term of years, of any Manors, Lands or Tenements, lying or being within the Precincts or Limits of any such Commission of Sewers, which*

be

be or which hereafter may be ordered and chargeable by any Laws, Ordinances and Conſtructions made or to be made by vertue of any ſuch Commiſſion wherein he or they ſhall be named or appointed Commiſſioner or Commiſſioners, not having Eſtate in Freehold within the Realm, of or in Manors, Lands or Tenements of the yearly value of Forty pounds, ſhall any time hereafter have power to ſit, or in any wiſe intermeddle with the execution of ſuch Commiſſion or Commiſſions, during the time he or they ſhall continue as be ſuch Farmer or Farmers of any ſuch Manor, Lands and Tenements, and ſhall not have Eſtate of Freehold as aforeſaid, but that every ſuch Commiſſion having reſpect only to every ſuch perſon or perſons for ſuch and ſo long time as he or they ſhall be or continue Farmer or Farmers of any ſuch Manors, Lands or Tenements, ſhall be denied and judged in Law as void.

But yet in the cloſing up of that Statute of 13 *El.* there is a Proviſo to this effect, *Provided always, that it ſhall be lawful for any Commiſſioner, being alſo a Farmer, and not having Lands or Tenements to the clear yearly value of Forty pounds of Freehold, to ſit by vertue of the ſaid Commiſſion, and have his voice and full authority with others to make and eſtabliſh Ordinances for Sewers, according to the Tenure of the Commiſſion touching and concerning all Lands and Tenements within the Precinct of every ſuch Commiſſion, other then ſuch Lands and Tenements as he or they for the time hold and enjoy as Farmer, as he or they might have done before the making of that Statute*, but he could not have ſitten in execution of this Commiſſion before the making of this Statute, unleſs he had beſides his leaſe Lands to the value of Forty Marks *per annum*: And therefore a Leaſe for years is no inablement at all, but a diſablement, as this Statute declares.

But the times when this having of Lands, &c. will ſuffice to qualifie a Commiſſioner to ſit within this Law, is now to be conſidered of, wherein I am opinion, that the *When having* muſt be referred to the *Then ſitting*: For the words of the Statute be, *That none take upon him to ſit, not having Lands to the yearly value of Forty Marks*, ſo that if he have not Lands of that value when he is firſt made a Commiſſioner

ner, yet if he have ſo much when he ſitteth upon the Commiſſion it will ſatisfie this Law; and if once he have Land of that value and ſitteth, and after ſell the Land away, or if they be evicted from him, he is then diſabled to ſit as a Commiſſioner by this Statute: And ſo if he were but Tenant for the life of *I. S.* and *I. S.* dieth, he ought not to ſit: In 12 *H.* 7. 7. a Juror which was to paſs upon tryal of Land was to have Forty ſhillings *per annum* of Freehold, and after he was impanelled, and before he was ſworn, he ſold away his Land, and when he came to be ſworn, he was challenged for want of Freehold, but the chalenge was diſalow'd, for after he was impanelled, his land (though after ſold away) was chargeable with the iſſues which he after might loſe in that matter; and with this agreeth 14 *H.* 7. 2. by *Frowick*: But our Statute is more preciſely penned, which is, *That none do preſume to ſit, unleſs he have Lands of that value, or be, &c.* therefore when he ſits he muſt have the Lands.

12 *H.* 7. 7.

And if *A.* do bargain and ſell his Lands to *B.* by Deed intended of that value, and before the Inrolment of the Deed *B.* do ſit as Commiſſioner, and after the Deed is Inrolled, yet this doth not qualifie his offence, and the relation of the working of this Deed doth not aſſiſt him to take off the penalty of this Law.

Alſo a man diſſeiſed is during the Diſſeiſin diſabled to ſit, for he had not then power to deviſe the Lands by the Statute of 32 *H.* 8. of Wills, for that Statute doth as ours doth, uſe the word *Having* in *preſenti*, and not in *futuro*.

And thus much I thought convenient upon this occaſion to deliver my opinion, when the Commiſsioner muſt have his Lands of Forty Marks *per annum* to inable him to ſit as a Commiſsioner within this Statute.

To Treat of the utter Bariſter I need not, for when he hath taken the Oath mentioned in the Statute, he is an abſolute and compleat Commiſsioner within this Law, to all purpoſes, although he have neither Lands or Goods, according as the Statute appointeth others to have.

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The ſecond queſtion.

The ſecond queſtion in my caſe touching this Statute, is, Whether the Counteſs of *Warwick* be a compatible Commiſsioner within this Statute.

Although it is uncouth in our Law to have women Juſtices and Commiſsioners, and to ſit in places of Judicature, yet by the Authorities enſuing you ſhall finde this a point worth inſiſting upon, both in Humane and in Divine learning; for in *Geneſis*, Chapter the firſt, after the creation of all other creatures being finiſhed, the Heavens adorned, and the Earth repleniſhed, God ſaid, *Let us make man in our own Image, after our likeneſs, and let him have Dominion over the fiſh of the Sea, and over all the Earth, and every creeping thing that creepeth upon the Earth: So God Created man in his own Image, in the Image of God Created he him, Male and Female Created he them; and ſaid unto them; Be fruitful and multiply, and repleniſh the earth, and ſubdue it, and have Dominion over the fiſh of the Sea, and over the foul of Heaven, and over every living thing that moveth upon the earth.* This was the firſt Commiſsion that ever was granted, and it paſſed under the Divine immediate Seal of the Almighty, & extended over the whole world; and by the vertue of the word *Dominamini* in the Plural number, God coupled the woman in Commiſsion with the man. But in the 18 Chapter of *Exodus*, Verſe 21. *Jethro* adviſeth and counſelleth *Moſes* his Son in law *to provide out of all the people men of truth, hating covetouſneſs, and place ſuch over them to be Rulers of Thouſands, Rulers of Hundreds and over Fifties & Tens*; where by the word *Men* twice repeated by *Jethro*, and this place of Scripture ſeemed to exclude wholly from Government, and the former Commiſsion extended over Fiſhes, Birds and Beaſts, and neither over men nor women: And in the firſt of the *Corinthians*, Chapter 14. it is ſaid by Saint *Paul*, *Let the women keep ſilence in the Churches, for it is not permitted to them to ſpeak.* And in *Grendons* Caſe in the *Comment. fol.* 497. *Dyer* ſaith, *That women could not adminiſter the Sacraments, nor were they permitted to ſay Divine Service.* And in the ſecond

Gen. cap. 1.

Exodus 18.

1 Cor. 14.

Chapter

2 Tim. Chapter of *Timothy*, Verse 12. he saith, *We suffer not the woman to rule over the man*; but this last of *Timothy* may be most aptly applyed to husband and wife.

I remember out of the Abbey Book of *Evesham* this Note worthy of observation, *Quod Alicia Peeres Regis minio-na supra modum mulierum nimis supergressa, sui etiam sexus & fragilitatis femineæ Immemor, nunc Justiciarios Regis, nunc in foro ecclesiastico juxta doctrines sedendo, & pro defensione causarum suadere & etiam contra jus postulare minime verebatur, unde propter scandalum petierunt à rege in Parliament sent* An. 50. Ed. 3. *penitùs amoveri*, but hereby I collect, that she was not in Commission with the Judges Temporal or Spiritual, but was a favorite of the Kings, and took upon her to intermeddle in businesses nothing concerning her: But whether the Text meant it for a woman to sit Judge in a Court of Justice, was *contra modum mulierum*, or because she sate there to wrest righteous Judgement, I refer to the readers of that History. For *Debora* was Judge of *Israel*, and Judged the people at the fourth of Judges hath it. *Dyer* indeed saith in *Grendons* Case, *That divers Churches were appropriated to Prioresses and Nonneries, whereof women were the Governesses*; whereby and by the said Chapter of the *Corinthians* it appears, that women might be admitted to have Rule and Government over the possessions and persons Temporal and Ecclesiastical, but were not admitted to have *curam animarum*, not to meddle with the administration of the Service or Sacraments.

And for Temporal Governments, I have observed women to have from time to time been admitted to the highest places; For in ancient Roman Histories I finde *Eudochia* and *Theodora* admitted at several times into the sole Government of the Empire: and here in *England* our late famous Queen *Elizabeth* whose Government was most renowned: And *Semiramis* governed *Syria*; and the Queen of the South which came to visit *Solomon*, for any thing that appears to the contrary, was a sole Queen: And to fall a degree lower, we have presidents that King *Richard*

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the firſt, and King *Henry* the fifth appointed and deputed by Commiſſions their Mothers to be Regents of this Realm in their abſence in *France*: And the wiſe and renowned Lady *Margaret*, Counteſs of *Richmond* was put in Commiſſion, and *Humfrey de Bohune* Earl of *Hereford* was by Tenure Conſtable of *England*, which is a Judge in Martial affairs, and he died without iſſue Male, by reaſon whereof the Office (amongſt other things) deſcended to his two Daughters and Co-heirs: And in the 12 of *Elizabeth*, in *Dier*, it is holden for Law, That although this was an Office of Juſtice, yet they might execute the ſame by deputy; for in truth women were unfit Martialiſts to judge of matters of that nature; and yet it is clear, a deputy doth nothing in his own name, but in the name of his Maſter or Miſtriſs, therefore the Martial Court was to be kept in their names: But yet I will deſcend a ſtep lower; doth not our Law Temporal and Spiritual admit of women to be Executrixes and Adminiſtratrixes? and hereby they have the rule or ordering of great Eſtates, and many times they are Gardianeſſes in Chivalry, and have thereby alſo the government of many great Heirs in the Kingdom, and of their Eſtates.

And in 10 *H.* 7. a man deviſed his Lands to be ſold by a woman, and died, and ſhe ſold the ſame to her husband: So by theſe Caſes it appeareth, that the Common Law of this Kingdom ſubmitted and committed many things to their government; yet the Statute of Juſtices of the Peace is like to *Jethroes* counſel to *Moſes*, for there they ſpeak of men to be Juſtices, and ſeemeth thereby to exclude women: But our Statute of Sewers is, *Commiſſion of Sewers ſhall be granted by the King to ſuch perſon and perſons as the ſaid Lords ſhould appoint*; So the words *perſons* ſtands indifferently for either Sex; And therefore although by the weakneſs of their Sex they are unfit to travel, and they be for the moſt part uncapable of learning to direct in matters of Judicature, for which cauſes they have been diſcreetly ſpared, yet I am of opinion, for the authorities, reaſons and cauſes aforeſaid, that this honorable Counteſs being put into Com- 10 *H.* 7

mission of the Sewers, the same is warrantable by the Law, and the Ordinances and Decrees of Sewers made by her and the other Commissioners of Sewers, are not to be impeached for that cause of her Sex.

And I conclude here, that although in discretion women have been secluded as unfit, yet they are not in Law to be excluded as uncapable.

If an Infant above the age of Fourteen, and under the age of One and twenty be made a Commissioner, his infancy shall be no cause to disable the Laws made by him; yong *Daniel* was Judge over both the Elders. And in Little *Brook*, *fol.* The case is, a Parson or Prebend being within age made a Lease for years of his benefice, and would but could not after avoid it for his Nonage, for seeing the Church had made him of full age to discharge the spiritual Office, our Common Law thought it fit to inable him to dispose of his Temporalties: and in 21 *H.* 7. *fol.* 12 & 13. the case is put by *Bridges*, and confirmed by Justice *Sylliard*, and was not denied by any, that an Obligation made by a Major and Commonalty, Dean and Chapter, Abbot and Covent, shall not be avoided for the Nonage of the Major, Dean or Abbot; yet all these serve in place of government, howbeit in the said matters their Nonages shall not impeach them: And in the third of *Isaiah* it is said, *I will give them children to their Princes, and babes to rule over them*; noting thereby an unfitness in them to govern, but debarred them not of the place: and of this matter this shall suffice.

21 *H.* 7.

3 *Isa.*

But now admit, as oftentimes it falls out, that Commissioners shall sit in the execution of this Commission of Sewers, which have not taken the Oath, which have not Lands of value, or which is not a free Citizen, and yet there be Ordinances, Decrees, and Laws made at those times; Now whether those Laws and Ordinances so made by a disabled Commissioner be void or not, is the question; or whether the disabled Commissioner shall only undergo the penalty of Forty pounds.

6 *H.* 8.

There was a Statute made in 6 *H.* 8. *cap.* 10. whereby it was

was Enacted, *That the Chancellor of* England *for the time being ſhould make no Commiſſion to any perſon or perſons (except he had Lands and Tenements of Eſtate of Freehold to the yearly value of Twenty pounds, or elſe be Juſtice of the* Quorum) *within any of the ſhires where he ſhould be made a Commiſſioner; and if any ſuch Commiſſion were directed to any perſon or perſons not having Lands or Tenements to the yearly value of Twenty pounds, or not being one of the Juſtices learned of the* Quorum, *as aforeſaid, That then every ſuch Commiſſion, and all Preſentments and Accuſations had and preſented before any ſuch Commiſſioners, be utterly void and of none effect.*

But this Statute is in time expired long ago, and therefore it is no interruption to our Commiſſioner; for although the Statute of 23 *H.* 8. which I read on hath a Clauſe in it in effect, *That all & every Statute and Ordinance heretofore made concerning the Premiſes, made in the time of the ſaid King, or of any of his Progenitors, not being contrary to that Statute, ſhould ſtand in force*; yet theſe words do not ſet on foot a Statute expired in time, as that of 6 *H.* 8. is: Alſo in the ſaid Statute of 13 *Eliz.* if a Termor or Leſſee for years be in Commiſſion, all Laws made which concern Lands whereof he is a Farmer are void as to him *vide antea.*

But to relie on our Statute of 23 *H.* 8. in my opinion it doth not avoid any of the Laws and Ordinances made by diſabled Commiſsioners, but doth onely inflict the puniſhment and penalty of Forty pounds a piece upon every of them, for every time they and every of them ſhall ſit in or about the execution of this Commiſsion; yet it ſeemed in the caſe *de Jure Regis Eccleſiaſtico*, That whereas the Statute of firſt of *Elizabeth* which authorized the Queen to grant Commiſsions to natural born ſubjects, that if ſhe had granted the ſame to an Alien, that acts done by him had been void. 23 *H.* 8.

But now my caſe proceeds to the next point or ſtep, and that is touching the Law and Ordinance made to race the ſaid Were; I inſerted this clauſe in my caſe, becauſe I had not formerly occaſion or fit opportunity to treat of the Lets,

Impediments and Annoyances which be contained within this Statute of 23 *H.* 8. and therefore I took this occasion to close up this days exercise with the discourse of them.

These by name are such Impediments & Annoyances as this Statute speaketh of,	1. Streams.	And the rest must be cõprised within these general words (*videlicet*) *Other like Lets and Impediments.*
	2. Mills.	
	3. Bridges.	
	4. Ponds.	
	5. Fishgarths.	
	6. Mildams.	
	7. Locks.	
	8. Hebbingweres.	
	9. Hecks, and	
	10. Floodgates.	

And the discourse upon all these will rest most upon the Statutes heretofore made touching the same.

Mag. Chart. cap. 23.

And the first Statute thereof made is in *Magna Charta, cap.* 23. *Omnes kidelli deponantur de cetero penitus per Thamesiam & Medwejam & per totam Angliam nisi per costeram maris*; what this word *kidellum* signifieth, appeareh by the title of that Statute, which is Weres.

This extends not to the Kings, *keddles per keble* in 13 *H.* 7. 35.

The next Statute to this is, 25 *Ed* 3. *cap.* 4. which doth Enact, *That all Mills, Weres, Stanks, Stakes & Kiddels were levied and set in the time of King* Edward (that Kings Grandfather) *and after, whereby Ships and Boats were disturbed, that they might not pass the Rivers as they were wont, should be cut and pulled down without being relieved.*

25. *E.* 3.

The said first Statute is general, that all Weres should be put down but by the Seacosts, yet this word (*All*) are intended of such only as were erected without lawful Warrant; and the said Statute of 25 *Ed.* 3. doth explain the generality of the said former Statute; For thereby it appears, That Weres erected in Navigable Rivers where Ships and Boats were wont to sail, should be extirped, because they were a hinderance to Navigation; but this extends

extends only to Navigable Streams which have been Navigable by use and Custom; and it is manifest by this Statute, that these Weres which were so to be put down must be only such as were erected in the time of *Ed.* the first and sithence, because those seemed to be erected without lawful authority, and being but erected in those times, they had not the countenance of Custom and Prescription to strengthen them.

The next Statute in time is that of 45 *Ed. 3. cap.* 2. which confirms the said Statute of 25. *Ed. 3.* and then adding thereto, that if any such annoyance be done, it shall be pulled down, and that he which shall relevy such annoyance, and be thereof duly attainted, he shall incur the penalty of One hundred Marks to the King, to be levied by the Estreats of the Exchequer; and the penalty is thereby given for the inhauncing of such Weres, Mills, Stanks, Stakes and Kiddels: This Statute is in part a confirmation of the said Statute of 25 *Ed.* 3. and in other part thereof it is a new Act in these points. 45 *Ed.* 3.

First, in the forfeiture of a Hundred Marks. 1.

Secondly, this is the first Statute in my opinion made against inhauncing of such things which are counted annoyances. 2.

And Thirdly, it gives the like penalty against him which shall relevy the annoyance, as against the inhauncer. And because this Statute depends upon the said Statute of 25 *Ed. 3.* it extendeth therefore but to Navigable Streams. 3.

The Statute of 1 *H. 4. cap.* 12. is a Statute in these points of great consequence; and it doth also confirm the said two former Statutes of *Ed. 3.* and doth thereto also make additions in these insuing points:

First, that Justices should be assigned to survey and keep the waters and great Rivers, and to correct and amend the defaults, as well by survey, advice and and discretion, as by inquest. 1.

Secondly, to survey the Weres, Mills, Stanks, Stakes and Kiddels in old time made and levied before the time of 2.

Ed.

Ed. the first, and them which they should finde too much inhaunced or straitned, to correct, pull down and amend, saving always a reasonable substance of Weres, Mills, Stanks, Stakes and Kiddels so in old time made and levied.

3. Thirdly, and if any such annoyances of Weres, Mills, Stanks, Stakes and Kiddels of passages, and straitning in old time made and levied, be adjudged and awarded by the said Justices to be pulled down & amended, he that hath the Freehold of the same shall make thereof Execution at his own costs within half a year after notification thereof made, upon pain of a Hundred Marks, and he which shall relevy, or inhaunce or straiten them against the said judgement, shall forfeit One hundred Marks to the King, to be paid into the Exchequer.

4. Fourthly, and he which shall finde himself grieved by Execution or otherwise in this behalf against right and reason, he may pursue and have right.

1. First, by this Statute I collect these matters; First if that a Were, Mill, Stank, Stake or Kiddel be newly or of late years built and erected in any Streams without Warrant or lawful authority, the same may be caused to be pulled down by Order of the Commissioners of Sewers, at the costs of the party which erected the same.

2. Secondly, If Weres, Mills, Stanks, Stakes or Kiddels have stood and been time out of memory in Rivers or Streams, and so have Warrant from Custom and Prescription, these may not be cut up or pulled down by the Commissioners of Sewers, because long use and Custom, which is a Law of this Kingdom, hath established them.

3. Thirdly, If there have been Weres, Mills, Stanks, Stakes or Kiddels time out of memory in Rivers or Streams, which of late years have been inhaunced, inlarged, or otherwise exceeded the ancient size and accustomed compasse, the excesse in those cases is only to be abated and pulled down; but so far as the ancient Size did extend to is not to be impeached: For the words of the said Statute be,

be, *That there be reserved always the reasonable substance thereof in old times accustomed.*

And in my opinion the generality of the said Statute of *Magna Chart. cap.* 23. is restrained by the succeeding Statutes, if the exposition should have been as large as the letter is.

And these three distinctions do fully declare the true effect of the said preceding Statutes.

Then next in Order of time is the Statute of 4 *H.* 4. *cap.* 11. which reciteth, *That by Weres, Stakes and Kiddels in the water of Thames, and in other great Rivers through the Realm, the common passage of Ships and Boats be disturbed, and much people perished; and also the young fry of fish destroyed, and against reason wasted and given to swine to eat*; Therefore this Statute Enacts, *That all former Statutes thereof made be holden, kept and put in execution.* 4 H. 4.

Here be two things which none of the former Statutes took order for;

The one is the perishing of the Kings people; 1.

The other the destroying of the Fry of Fish which were occasioned by the erecting of these Weres, Mills, *&c.* 2.
Yet these are businesses which are otherwise provided for, and be not pertinent to these Laws of Sewers. And therefore I shall passe them over without any other further explanation thereof.

The Statute of 12 *H.* 4. *cap.* 7. doth confirm all the said former Statutes made against Lets, Impediments and Annoyances; And doth further Enact, *That if contrary to the Award, Rule or Judgement of the Commissioners made according to the Statute of* 1 H. 4. *it be found, that any Weres, Fishgarths, Mills, Mildams, Locks, Hebbingweres, Stakes, Kiddels, Hecks or Floodgates be made, levied, inhanced, straitned or inlarged against the said Statutes, the offendors therein contrary to the aforesaid Award, Rule and Judgement being warned by the Sheriff or under Sheriff of the County upon a* Scire facias *to that purpose directed where these annoyances be, and within three Moneths after such garnishment do not wholly amend, break down and avoid the said making, levying and inhancing, straitning* 12 H. 4.

ſtraitning or inlarging, That the party being defective in that behalf ſhall forfeit One hundred Marks to the King, to be levied by Eſtreats out of the Exchequer; and if the Offendor, his Heirs, Aſſignee or Aſſigns, or any of them do defer or continue the ſame default, contrary to the Award, Rule and Judgement of the Commiſſioners, he or they ſhall forfeit One hundred Marks, the one moyety to the King, the other moyety to the party that will ſue for the ſame.

And alſo it was further enacted, *That if any perſon or perſons, other then ſuch againſt whom ſuch Award, Rule or Judgement was made, or any of them, do preſume to occupy or continue any of the Weres, Fiſhgarths and Impediments aforeſaid, or other incumbrances, he ſhall forfeit for every default for every Meneth One hundred Marks, the one half to the King, the other half to the party that will ſue.*

It appeareth, that this Statute ſpeaketh of Milldams, Locks, Hebbingweres, Hecks and Floodgates, which the other Statute never ſpeaketh of; ſo in extent thereof it hath more inlargement: And in my opinion all the foreſaid Statutes did extend only to Navigable Streams and Rivers, with ſhips and Boats.

In the Tenth *Report* of Sir *Edward Cook*, the caſe of *Cheſter* Mills upon the River of *Dee*, was as inſueth, *That a Cauſey or Milſtank of ſtone in the River of* Dee, *in the City of* Cheſter, *was made and erected for the neceſſary maintenance of certain Mills, ſome of the Kings, others of the Subjects, which ſtood at the end of the Cauſey*; were of late by the Decree of the Commiſsioners of Sewers Ordered, That a breach therein of ten Roods or Pearches ſhould be made, which Cauſey or Milſtank was by the agreement of all parties erected before the time of *Edw.* the firſt, and ſo had continuance without any inhauncing or exaltation: And whether this Decree was warranted by any of the ſaid Statutes or not, was the queſtion, which was referred by the Lords of the Counſel to the two Chief Juſtices, *Fleming* and *Cook*, and to *Tanfield* the Lord Chief Baron, to be conſidered on; and the ſaid Chief Juſtices and chief Baron declared their

opinion

opinion, That the ſaid decree was not warranted by any of the ſaid Statutes; for they ſaid that the two Statutes of 25 *Ed.*3. & 45 *Ed.*3. extended but to ſuch impediments as were ſet up and erected in the time of *Ed.* 1. and after; and that the generality of the Statute of *Mag. Char.*, *cap.* 23. was reſtrained by theſe two Statutes; And that the Statute of 1 *H.*4. extended to ſuch Weres, Kiddels, *&c.* and other lets as were erected before the Raign of King *Ed.* the firſt, and which have been inhanuced and exalted ſithence, and ſo was out of all thoſe Laws, becauſe there was no ſuch inhauncing.

And the Statute of 23 *H.* 8. which I now read on, did not alter the former Statutes in theſe points; But provided, That all and every Statute, Act and Ordinance heretofore made concerning the Premiſes in that Act recited, not being contrary nor before then repealed, ſhould ſtand then in force: But the ſaid Judges did hold opinion, that all the ſaid Statutes ſtood unrepealed, and acordingly made their Report to the Lords of the Councel.

There be many private Statutes made for the abating private Weres in ſome Streams which are not within my intent to recite, further then by naming of them, becauſe I take it they are not confirmed by the Statute I read on; As 11 *H.* 7. *cap.* 5. *Southampton*: 14 *H.*8. *cap.*13. 23 *H.* 8. *cap.*18. *Havens*: 25 *H.* 8. *cap.* 7. *for killing Fry of Salmons*, 27 *H* .8. *Raſtal Havens* 9, 10, 11.

In 19 *Jacobi Regis* there was a great Cauſe depending in the Court of the Dutchy at *Weſtminſter*, between *Benedict Hall* Eſquire, Plaintiff, and *John Maſon*, *George Worral*, and *Thomas Powel*, Defendants, which was in effect as followeth, *That Queen* Mary *was ſeized of the Manor of* Monmouth, *with the Appurtenances in that County, and of a Free fiſhing in the River of* Wye, *and of a Were and a Fiſh yard there, which were erected in the time of the ſaid Queen, in the place where an old Foundation of an ancient Were did ſtand:* This Were had been letten by the ſaid Queen, and alſo by Queen *Elizabeth*, under the Seal of the ſaid Dutchy by yearly Rents, and ſo there were ancient preſidents ſhewn

in that Court, whereby it appeared, that the ancient Were there had been letten to Farm by the Earls and Dukes of *Lancaſter*, and by the Kings and Dukes for a long time for yearly Rents: So that it was manifeſt that it was an ancient Were time out of memory: And this Were and Fiſhyard, and the Profits of Fiſhing were letten by the Kings Majeſty that now is, under the Seal of the Dutchy of *Lancaſter*, in the Tenth year of his Raign, to one *John Abrahall* Eſquire, for One and thirty years, for and under the yearly Rent of Six pounds thirteen ſhillings and four pence payable to his Majeſty his Heirs and Succeſſors; And the ſaid *Abrahal* being ſo thereof poſſeſſed, did afterwards in the Tenth year aſſign the ſame to one *William Hall* Eſquire, by reaſon whereof the ſaid *William Hall* was thereof poſſeſſed; and in the 12. year of this King, made his laſt Will and Teſtament, and did thereby ordain the complainant his Executor, and after dyed; by and after whoſe deceaſe the Complainant came to be poſſeſſed of the ſaid Leaſe and Term therein to come; and in the Nineteenth *Jacobi Regis*, the Commiſſioners of Sewers in thoſe parts cauſed a Jury to be impanelled and ſworn, touching this Were & Fiſhyard, and gave therein a Verdict to this effect; that is, *That* Benedict Hall *the complainant was poſſeſſed of the ſaid Were, called* Monmouth *Were, upon the River of* Wye, *which was exceſſive high and hurtful, and was an impediment to the common paſſage of Boats, Barks and Ballangers up and down the ſaid River, and by means thereof they could not paſſe but in great danger, which if the ſaid Were were not, Boats of two or three Tuns might paſſe the River; and that the ſaid Were had bin the death & drowning of one of the Kings Subjects, and is the cauſe of the ſcarcity, dearneſs and want of Salmons, and other fiſh within the ſaid River, by reaſon many of them were taken in gins of the ſaid Were, when they were out of ſeaſon, and that the ſame was a great abuſe, wrong, enormity and annoyance to the whole Country.*

Whereupon the ſaid Commiſſioners made an Ordinance or Decree, ſetting forth thereby in effect as followeth, *That whereas it did appear to them, as well by the examination of Witneſſes, as by the ſaid Verdict of the Furors, and by their view,*

that

that the ſaid Were was a great let and hinderance to the common paſſage of Boats and Ballangers up and down the River, indangering of the lives of the Kings Subjects, and to the deſtruction of Fiſh, as the Salmons and Fry thereof; They therefore Ordered, That the ſaid Were ſhould be overthrown, and that the Timber and Stone thereof ſhould be removed, whereby the Channel ſhould be cleared for paſſage of Boats; And accordingly did direct their Warrant under their Hands and Seals to the defendants, Authorizing them thereby to overthrow the ſaid Were, which they performed accordingly: And all this matter of the verdict of the Jury, and Decree of the Commiſſioners were ſet forth at large in the Defendants anſwers; and after examination and publication of witneſſes, the Cauſe came to be heard in the ſaid Dutchy Court before Sir *Hamfrey May* Knight, Chancellor of the Dutchy, Sir *John Denham* Knight, one of his Highneſs Barons of the Exchequer, an aſſiſtant to that Court, and Sir *Tho: Chamberlain* Knight, one of the Kings Juſtices of his Bench, another aſſiſtant of the ſaid Court, and Sir *Edward Moſley* Knight, Attorney of the ſaid Court, who were of opinion, That the ſaid Were being an ancient Were by Preſcription and Cuſtom, it ought not to have been overthrown by the Decree of the Commiſsioners of Sewers, and that the ſaid verdict of the Jurors was defective, becauſe though they preſented the ſaid Were to be over high and inhaunced, yet in regard they did not preſent in *quanto* nor in *qua parte*, the ſaid Were was inhaunced above the ancient aſsize, therefore they eſteemed the ſaid Verdict of no validity.

But now it comes next in time and turn to declare my opinion touching and concerning Bridges, Mills, Mil-Dams, Milſtanks, Floodgates, Hecks, Locks and Hebbingweres, which in the ſaid Statutes be ſet forth for Lets, Impediments and Annoyances, wherein they are to receive their expoſition according to the ſaid caſes of Weres, without other diſtinctions; for if they have had continuance time out of memory, then are they the proper and peculiar inheritances of the King, or of his Subjects, allowed by

ancient Cuſtom, confirmed by long uſe, and to remain eſtabliſhed without overthrowing or deſtroying: But if they have been inhaunced or inlarged over their ancient and accuſtomed aſsize, then the inlargement and exceſs is onely to be abated, and no more; for the Statute of 1 *H.* 4. ſaith, *That there muſt be left ſufficient ſubſtance of the ancient:* And if any new Were, Stank, Stake, Floodgate, Kiddel, or other thing have of late been erected on the Rivers, which is an annoyance or hurtful, then the ſame may be ordered by the Commiſsioners to be abated, overthrown, deſtroyed and pulled down, becauſe the ſame was erected without lawful warrant or authority: And ſo as I take it, theſe few diſtinctions do fully declare my opinion touching thoſe matters.

The Statute of 23 *H.* 8. which I read on touching and concerning Lets, Impediments and Annoyances, hath theſe words in it in effect, *And the Commiſsion giveth Authority to* Edmond *Lord* Sheffield, *Sir* Philip Tyrwhit, *Sir* Nicholas Sanderſon, *Knights and Barons*, *Sir* Richard Aurcots, *Sir* John Thorold, *Sir* John Read, *Sir* Charls Bouls, *Sir* Ralph Maddiſon, *Sir* William Hanford, *Sir* Francis South, *Knights*, Thomas Tyrwhit, John Bolles, *and* Nicholas Hamerton, *Eſquires, whereof the ſaid Baronet and Baronet were of the* Quorum, *to ſurvey the Walls, Streams, Ditches, Banks, Gutters, Sewers, Goats, Calceys, Bridges, Trenches, Mills, Mildams, Floodgates, Ponds, Locks, Hebbingweres, and other Impediments, Lets and Annoyances, and the ſame to cauſe to be made, corrected, repaired, amended, put down or reformed, as cauſe ſhall require, after their wiſdoms and diſcretions; and therein to ordain and do after the form, tenor and effect of all and ſingular the Statutes or Ordinances made before the firſt day of* March, *in the 23 year of* H. 8. *touching the Premiſes, or any of them; as alſo to inquire by the Oaths of honeſt and lawful men of the ſaid ſhire or ſhires, place or places, where ſuch defaults or annoyances be, as well within liberties as without, by whom the truth may rather be known through whoſe default the ſaid hurt and damages have happened; and who hath or holdeth any Lands or Tenements, or Common of Paſture, or profit of fiſhing, or hath*

or

or may have any hurt, loſs or diſadvantage by any maner of means in the ſaid places, as well near to the ſaid Dangers, Lets and Impediments, as inhabiting or dwelling near about the ſaid Walls, &c. and Impediments aforeſaid, and all thoſe perſons to tax, aſſeſs and diſtrain.

In a former clauſe of this Statute, the Commiſsion giveth power to ſurvey the Walls, Banks, Ditches, Gutters, Sewers, Goats, Calceys, Bridges, Streams; In which clauſe theſe as neceſſary Defences are ordered to be repaired.

Then comes another clauſe, wherein theſe things are recited as Lets and Impediments, *videlicet*, Streams, Mills, Bridges, Ponds, Fiſhgarths Mildams, Locks, Hebbingweres, Hecks and Floodgates; So that by theſe two clauſes, the firſt ſort were to be maintained and not deſtroyed, and the ſecond ſort ſhould have been deſtroyed and not repaired.

And if theſe two firſt clauſes had been alone, then the Commiſsioners had been bound to maintain the one and deſtroy the other, without any toleration; but then came in the ſaid third clauſe, which is the clauſe of moderation, and therein as well the Defences, as the Lets and Impediments, come all in one clauſe promiſcuouſly put together; and ſo the words (*amend, correct, repair and put down*) is therein referred to them all: ſo as in my opinion all defences, as Walls, Banks, Sewers, Calceys, Goats, &c. be not to be maintained, becauſe in tract of time ſome may prove unneceſſary and unuſeful, which for that cauſe may be pulled down: ſo all Mills, Mildams, Floodgates, Weres, Stanks, Stakes, Kiddels, and ſuch like, are not to be put down and overthrown, but ſuch as are ancient and are thereby grown to be the proper inheritances of men, and ſuch alſo which are uſeful and neceſſary are to be maintained, kept and repaired; for in ſome great Havens and Ports, great abundance of Piles and Timberpoſts are ſet in the waters to ſtay the rage, force and violence of the waters for the ſafegard of the Port and Haven.

It

It were a very ridiculous expoſition of this Law, to urge the Commiſsioners to overthrow thoſe things which are helpful, and not hurful; for this Statute did foreſee, that theſe Mildams, Stakes, Stanks, Floodgates, Weres, &c. were not at all times and in all places hurtful, and therefore was the ſaid clauſe of the Statute inſerted, which gave the Commiſsioners power to put down ſuch as were Lets and Annoyances in truth, and where they were uſed for ſtrengths and were of good uſe to maintain the ſame: And this conſtruction I take it is fully maintained by this Statute, but more eſpecially by the Statute of *7 Jacobi, cap.* 20. where Peres, Piles, Jetties, and the like, ſet for fortifications and ſtrengths, are expreſly ordered to be maintained.

7 Jac. Reg. cap 20.

And upon this part of this Law I do collect theſe inſuing matters:

1. Firſt, that if one do erect and build a Were, Mill, Mildam, or other thing on a River Navigable, to the hinderance of Navigation; or if there was an ancient Were which was inhaunced of late years, the Commiſsioners of Sewers are to order him that did erect the one, and he which did inhaunce the other, to pull down the firſt, and to abate the exceſs of the other at the Coſts and charges of the owner: and if he or his Aſſigns or Heir, ſhall contrary to the Decree, Order or Judgement of the Commiſſioners, after the ſame hath been reformed, relevy the ſame again, or do continue the ſame contrary to order, the puniſhment of One hundred Marks is to be impoſed upon the offendors, as by the Statute of *1 H.* 4. and *12 H.* 4. formerly appeareth.

1 H. 4. *12 H.* 4.

And if one which is a ſtranger of his meer malice or own wrong doth pitch down Piles, or ſet down Stakes in the Rivers and Streams, he is to be fined or amerced for this offence, as the caſe ſhall require, and he is to be ordered to remove the Nuſans at his own coſts and charges; and if it cannot be found out who did the Nuſans, then the Commiſſioners of Sewers are to order thoſe to remove that annoyance which in all likelyhood are to ſuſtain moſt damage thereby

thereby, *Et ita factum fuit*, in 42 *lib. Aſſiz. plac.* 15. and this Statute extendeth to Rivers and Streams Navigable, as well as to ſuch as be not Navigable. 42 *lib. Aſſiz.*

And touching the removing of Nuſances, I ſhall put the Commiſſioners ſome preſidents ruled and adjudged in our Books of Law which come fully to the purpoſe of the matters and things I now treat of.

In 32 *Ed.* 3. *fol.* 8. an aſſize of Nuſans was brought by *A.* againſt *B.* for that *B.* had made a Trench over a River, and drew away thereby part of the waters and ſtream another way then that which it did formerly uſe to run, and thereby ſurrounded the grounds of *A.* and the aſſize paſſed for the Plaintiff; & it was adjudged, that the waters ſhould be removed into the ancient current & channel at the coſts of the Defendant, and the Plaintiff recovered his damages *Et quod defendens capiatur*; out of which caſe I obſerve theſe things: 32 *Ed.* 3.

Firſt, though an aſſize was a private Action, yet the Nuſans was *tam querenti quam populo* to the Plantiff, for drowning and ſurrounding of his grounds; to the people, in changing or diverting the ancient courſe of the waters, ſo that for the people the offendor was ordered to reform the Nuſans, to the King he was fined, and the Plaintiff for his own private wrong recovered his damages.

In 19 *Ed.* 3. *lib. Aſſize, plac.* 6. A preſentment was found by Jury before Commiſsioners, that certain perſons by name had turned the courſe of the River of *Lee*, which is there termed the Kings Stream, and runs from *Ware* to *Waltham*, and ſo to *London*, and had fixed and pitched Piles and Stakes therein, by means whereof Boats and Ballangers were hindred in their paſſages up and down the River, and upon this Preſentment it was awarded, that thoſe perſons which were preſented by name, and which had done part of the Nuſans, ſhould reform the ſame; and becauſe ſome of the parties names could not be diſcovered which had done other part of the ſaid Nuſans, It was Ordered, That the Sheriff ſhould be commanded by Writ to him to be directed to reform that part of the Nuſans, taking therein to his aſſiſtance 19 *Ed.* 3.

thoſe

thoſe perſons who had grounds next adjoyning; And *quod defendentes ſint in miſerecordia dom' Regis*, becauſe the Nuſans was not found to be done by force.

In 19 *Ed.* 3. *fol.* 23. in the Action upon the Caſe for a Nuſans done, the judgement in part was, That the Nuſans ſhould be removed *& cum hoc concordat*, 7 *H.* 4. 8. upon theſe three caſes I obſerve,

7 H. 4.

That be the Action private or popular, always one part of Judgement was, That the Nuſans ſhould be removed at the coſts and charges of him or them which did it.

Therefore theſe caſes do fully maintain my opinion formerly delivered: And although in all the ſaid caſes it appeareth, that there was a legal courſe taken to remove the Nuſances, yet there is another courſe alowed of by the Law, and that is by abating of the Nuſans, in pulling or cutting the ſame down; and the Law is expreſſe ſo in the point in

9 Ed. 4.

9 *Ed.* 4. *fol.* 35. as if it be a Nuſans done to *I. S.* he or ſome other by his directions may overthrow the Nuſans; but if it be done *ad nocumentum populi*, as in the high or royal ſtreams, then any perſon prejudiced thereby may abate the ſame.

To make a ſtream navigable.

BUt it hath been objected to me by way of Interogation, Can the Commiſſioners of Sewers make an unnavigable River or Stream to become or to be made Navigable by theſe Laws of Sewers, yea or no? Touching which I ſhall deliver my opinion as followeth:

If this could have been done by the Commiſſioners of Sewers, then what ſhould it have needed to have procured Acts of Parliament for the doing thereof, as 9 *H.* 6. *cap.* 9. to make the River of *Lee* Navigable, and 6 *H.* 8. *cap.* 17. a Statute to make the River at *Canterbury* Navigable; and and in 31 *H.* 8. *cap.* 4. to make the River of *Ex* near *Exeter* Navigable: and 27 *Eliz.* *cap.* 20. to make a River Navigable at *Plymouth*; and in 3 *Jac.* 10. *cap.* for making *Thames* Navigable

Navigable in the Counties of *Oxford*, *Berks*, *Wilts*, and *Gloceſter*: Theſe in truth are good Arguments, but not convincing Proofs; for I am of opinion, that if Streams cannot be made Navigable unleſs there were certain Mills, Weres, Stanks or Kiddels removed which be the Inheritances of private perſons, and have had continuance time out of memory, then directly the Commiſſioners of Sewers have not power to raze or impair theſe by the removing thereof, to make the Stream Navigable: But in theſe caſes a new private Act of Parliament muſt be obtained for the effecting thereof, which was the occaſion many of the ſaid private Statutes were obtained: But if none of theſe Inheritable incumbrances ſtand in the way, but that by the cleanſing or deeper caſting of the Channel the ſame may be made Navigable, Then I am of opinion, the Commiſſioners of Sewers have power to do the ſame, and there be words in our Statute will bear this Expoſition (*videlicet*) *And to cleanſe and purge the Trenches, Streams, Sewers, Gutters and Ditches, in all places neceſſary.*

And herewithal I intend to cloſe up this days exerciſe with this ſhort concluſion; that is, That *E.* was no ſufficient Freeman, nor was reſciant, nor had goods of value to make him a competent Commiſſioner; That notwithſtanding *B.* and *C.* and the Counteſſe of *Warwick* were competent Commiſſioners, and they joyning with Three of the *Quorum* had power to make and ordain Laws of Sewers; and becauſe this Were was newly erected, therefore the Law and Ordinance made to raze it and to pull it down was a good Law, and warranted by this Statute, *&c.*

Finis hujus quartæ Lecturæ.

Quinta Lectura.

GEnerous Auditors, my fellows and friends of this moſt famous and renowned Inns of Court, I have ſailed ſo far within the Land, that my ſhip hath taken up her harbor in the Inland ſtreams, and I my ſelf am got up to the higheſt Mountains, to the end I might take the view and ſurvey of all my former days labors; and this being the laſt day of my reading, I muſt now make my accompt to you of my Stewardſhip: The Talent which was delivered me when I entered upon my firſt days Exerciſe, was this worthy Statute of Sewers, which I have put forth to the beſt uſe I could in my poor skill and underſtanding; But in the caſting up of my Accompts, it may be it wil come ſhort of your exdtations; if it do, I pray you help to increaſe it out of your abundant ſtore; and conſider with your ſelves, that your Reader took in hand to read upon a Maiden-law, which never before this time abide his Expoſition in any Inns of Court, and our Law Books are exceeding ſcarce in the handling of matters of this kinde & nature; and ſo I wanted thoſe means and helps which many other Readers have had, who have taken upon them to make their readings of Statutes formerly read on, and which have received a more plentiful Expoſition in our Books and Terms of the Law then this of mine hath done.

It hath been the ancient cuſtom of this houſe, for the Reader in his laſt days Exerciſe to make a brief repetition

in the maner of an Index, of the moſt ſubſtantial heads of his Statute, and of his diviſions: And becauſe every profeſsion is moſt graced when it is followed and trode out in the ſteps of learned Predeceſſors, I intend therefore to be no changling, nor mean I to produce or bring up new uſages, leaſt old Cuſtom ſhould forget what her ſelf had been: In this maner therefore do I make my Repetition;

Firſt, I delivered my opinion touching the extent of this Statute, which was as large as the Realm of *England*; and that the Engliſh ſeas were within the Realm.

I made it to appear, that the Dominion and Empire of theſe ſeas, The legal power of Adminiſtration of Juſtice, The property, profit and poſſeſſion thereof, doth appertain to the King.

And that theſe profits were of two kindes, { Real and Perſonal.

The Real profits were the grounds relinquiſhed by the ſea, which were always ſuch grounds as had been always before covered with waters: But ſhores and ſuch grounds which *Alternis vicibus*, were wet and dry, were not accounted relinquiſhed grounds, and that relinquiſhed grounds belonged to the King; but the ſhore and caſual drowned grounds might belong to a ſubject.

The Perſonal Profits of the Sea did conſiſt in { Wreck. Flotſan. Jetſan. Ligan; and

great fiſhes, which are due to the King by the Royal Prerogative of his Crown; But ſubjects might have the Inheritance of the firſt four by Preſcription, and of the laſt by Charter from the King.

Then I deſcended into Iſlands, Which are of two ſorts:

Firſt,

Firſt, on the ſea, old ones and new ones, That both were within the Kings power, and the new ones His in property.

Freſh Iſlands in the Land might belong to ſubjects; The nature of them all were, that they were *undiq; circumdatæ aquis.*

I then landed at the ſhore, which in definition containeth thoſe grounds which extend from the loweſt Ebb to the higheſt Flood, That the King had the property thereof *de Jure*, a ſubject might have it *ex perquiſito*, and the people had their *uſum neceſſarium.*

I proceeded further to the Coaſts, whoſe content and contingent I deſcribed ſo near as by Hiſtories I could inform my ſelf; And ſhores and coaſts I held them to be *Maris acceſſoria.*

From theſe I proceeded to Creeks, Havens and Ports, and theſe I ſet forth in their ſeveral kindes.

And I concluded with the compaſs of my Statute and my Commiſsion, and with the diverſity thereof, That within the circle of my Statute, Seas, Iſles, Shores, Coaſts, Ports, Havens, Creeks gained, and relinquiſhed grounds were comprehended, becauſe that might depend (*in poſſe*) but yet the Commiſſioners which was (*in præſenti operative*) did extend but to the utmoſt Banks and Walls towards the ſeas: And I concluded the points of my Caſe with the difference between grounds left and grounds gained from the ſeas; and thus I ended my firſt Lecture.

The ſecond Lecture.

IN my ſecond Lecture I came on Land, and took upon me to ſet forth her friends from her foes; her friends I counted ſuch as had defended her from the violence of the ſeas, and from inundation of ſalt waters.

And theſe were her frineds (*viz.*) Banks, Sewers, Goats, Calceys and Bridges; theſe are to be maintained and repaired, and are the Defences which I fully treated of.

And

And these were the enemies, Streams, Mills, Ponds, Fishgarths, Mildams, Locks, Hebbingweres, Hecks and Floodgates.

These are Lets and Impediments which this Statute speaketh of, and are to be corrected, reformed or put down as cause shall require.

I shewed then that Rivers were of two kindes, Royal and Common Rivers; That there were other inferior kindes of those watery instruments which might take place after Rivers, as Ditches, Gutters, Sewers, Pools, Ponds, Springs.

That water is the substantive of all these, and if it be a running water at random, then it is a stream; if it be a running water, and pent within Walls or Banks, then it is a River, Gutter, Ditch or Sewer; These in their several kindes I did distinguish; And Springs I held to be the vital spirit of them all.

I then described the Commissioners maner of proceedings, which might be three maner of ways;
- By view and survey, and wherein they consisted.
- By Jury, and on what parts that stood.
- By discretion, and the diversities and definition thereof.

After these I took upon me, by how many several ways the defences might be maintained, which were nine in number,
1. Frontage.
2. Ownership.
3. Prescription,
4. Custom.
5. Tenure.
6. Covenant.
7. *Usus Rei.*
8. A Township; and
9. By the Laws of Sewers.

All these I proved by Reasons, Presidents and Authorities, and did at large discourse of them.

Then

Then I came by the courſe of this Caſe to treat of Seſſes, Taxes and Lays ſet by Commiſſioners of Sewers, whereby I found ſome Inheritances there were which were ſubject to theſe ſeſſes; as thoſe that follow Houſes, Land, Meadow, Paſture, Woods, Heaths, Furs, Moors, Mariſhes, Rents, Ferries, Piſcharies, Commons, Free paſſage, Parks, Warrens.

And many Inheritances I found in reaſon freed from theſe Taxes and Lays, as Tythes in Spiritual hands, Annuities, Chaſes, Penſions, Proxies, Portions, Marts, Fairs, Markets, Offices, things in Action, Conditions, Contingents, Uſes, Preſentations, Foundetſhips.

I alſo found theſe Seſſes of three kindes, *viz.*
- Cuſtomary, and then they may binde the Mountains as well as the Valleys.
- Hereditary, and then the particular Tenant and the Reverſion muſt both contribute.
- Temporary, which bound the Poſſeſſor.

And here I ended my ſecond days Lecture.

The third Lecture.

MY third Lecture I did diſtribute into three general heads, which were meerly the grounds of the execution of theſe Laws.

Which conſiſted either in puniſhing the body and perſon of the Delinquent with
1. Impriſonment.
2. Fine: and
3. Amerciament. 1.

Or in doing Execution upon the Offendors Eſtate,
1. By Diſtreſs: or
2. By ſale thereof. 2.

Or

Or otherwise in extending it upon a mans personal Estate, by
1. Charging of the Land perpetually: or
2. By the absolute sale thereof.

And under these general Rules I comprised these particulars which follow:

First, for the Honor of this Commission, and for the more necessary execution of these Laws, I found them out a Court, wherein I set forth in what cases Commissioners might Imprison the Bodies of Delinquents, and in what cases they might impose a fine, and when Amerciaments be due; and then I shewed that for some transgressions neither Imprisonment, Fine nor Amerciament was to be imposed.

I then came to Distresses, and held a treble distinction of them (*videlicet*) that some were
1. Judicial, and issued out of the Judicial Records of this Court.
2. Other Ministerial.
3. The third Legal; wherein all these Diversities I screwed out by proved Authorities.

Then I shewed in what places these Distresses might be taken, when upon the Land charged, when within any place within the extent of this Commission, and sometimes within any place of this Realm; And when the proper goods of the party might be taken, and when the goods of strangers, and when goods may be sold by this Law.

Afterwards according to the order prescribed me by my Case, I declared that there were some Interrupters to the Execution of these Distresses.

The one was by suing Replevins, wherein I took these diversities:

That

That a Sheriff being an inferior Officer could not of his own power deliver a diſtreſs taken by warrant of Sewers; But that the Commiſſioners of Sewers are bound to obey a Replevin coming out of the Kings Courts at *Weſtminſter*, *Quia de altiori natura*; Thus yet notwithſtanding goods taken by a Judgement were exempted from that Replevin.

Then I proceeded to the charge of Lands, whether a perpetual charge might be impoſed, or not.

And from thence I came to Sales, and thoſe I diſtributed into four points;
1. Firſt, for what cauſe.
2. What Lands.
3. Whoſe Lands.
4. To whom theſe Lands might be ſold.

I after came into the Tractate of Legal proceedings, which may be uſed in our Court of Sewers; and firſt when and which preſentments of Sewers are traverſable, and which not.

And then wherein a party wronged may have his juſtice in this Court, and in what caſes not.

And whether the ſtrict words of the Statute would admit of Exemptions, and the difference of them, that ſome were general, others ſpecial; and therein I ended the Third days Exerciſe.

The fourth Lecture.

THe fourth day I treated of the Ability and Non-ability of the Commiſſioners, either by reaſon of ſome perſonal defect, whether it conſiſted in Sex, Exile or other impediment that way.

And what Eſtate and value of Lands made one a competent Commiſſioner, and what did the contrary; and the times when the Commiſſioner muſt have this Eſtate.

ThenI delivered my opinion upon the words of the Statute, which be valuable Hereditaments to inable a Commiſſioner, and which were not.

Then I proceeded to intreat of a Commissioners Ability in goods and moveable substance, and which were moveable substances within this Statute, and which not.

And becaufe in the Citizen-Commissioner Three things were required to make him able (*viz.*) Freedom, Estate in goods, and Resciancy; I therefore handled fully all these parts thereof.

After all which, becaufe I had before this time no fitting opportunity to treat of Lets and Impediments, I therefore in this Lecture disposed my case in such sort as it took hold of them all.

And first, becaufe the Statute I read on confirmed all other former Laws concerning the same, I therefore repeated them all from *Magna Charta* to this very time, and gave an explanation or declaration of them all.

I then distributed the learning of these Laws into 3 heads:

1. First, that these which had the strength of a Custom, and were grown to be particular Inheritances of private persons, could not be extirped.

2. Secondly, and whereas some were newly erected without Authority, they might be overthrown.

3. Thirdly, and whereas some were ancient, and were exalted above or beyond the ancient assize, the excesse might only be abated; with these differences I satisfied these Statutes.

Then came I to our Statute I read on, & therein I took new

1. diversities that was upon the Three Clauses of my Statute.

2. The first did maintain the defences.

3. The second destroyed the offences.

And the third was a general Clause, reciting the defences and offences together, and did give the Commissioners power to reform or amend, repair or put down, as cause should require.

Wherein I published this learning thereupon, That if an old Walk, Bank, Bridge or other Defences, were found to be out of use, it might be extirped.

And if a Were, Mill, Mildam, Stanks, Stakes, Piles or Floodgates were found beneficial to the publike good, they might be preserved and maintained.

And

And I vouched ſome preſidents, at whoſe charges the ſaid Lets and Impediments ſhould be removed, and I ended my Argument with this, In what caſes Commiſſioners of Sewers might make unnavigable Rivers navigable, and and where not; and in that I concluded my fourth Exerciſe.

This is the extent of my accompt, wherein I think I have done my ſelf ſome wrong in making ſo ſhort a Breviate, in omitting many things which I truly took pains in; but becauſe you were all preſent and privy to my layings out, I hope though I have omitted them in my extreats, you will allow me them in *Summa totalis*.

But by your good favors I intend not to break Cuſtom or Promiſe in any thing; for I have ſome ſtock more left, which I told you when I began I had caſt under hatches, which now alſo I mean to diſtribute amongſt you; And becauſe there is ſome part of this as yet left untreated of, I will now therefore proceed to the unfolding thereof.

And the ſame conſiſteth in theſe words of the Law, *That the Commiſſioners hereafter named in any Commiſſion, according to the purport of the ſame, have full power and authority to make, conſtitute and ordain Laws, Ordinances and Decrees, and the ſame Laws and Ordinances ſo made to repeal, reform, amend and make new, as the caſes neceſſary ſhall require in that behalf.*

So that whereas other Judges have power onely *Jus dicere*, theſe Commiſſioners have alſo power *Jus facere*; yet this Statute gives not the Commiſſioners of Sewers abſolute power and authority to make and ordain Laws but *ſecundum quid*; for theſe Laws which they are to make, muſt be for the ſafegard, conſervation, redreſs, correction and reformation, and more then theſe, they muſt be neceſſary and behoofful; ſo they muſt not be made out of ſelf-will, and affection, but after their Wiſdoms and Diſcretions.

Wherein I conceive, that never a ſentence in this Statute is ſeaſoned with more variety of caveats and grave direc-

ctions then this Statute is in this very clause of making new Laws; so that these Laws ought to be made to amend, not to make worse; they must be necessary, not nugatory, they are to be composed with wisdom, and disposed of with good discretion, and they ought chiefly to be made *Pro bono publico*, and not *Pro privato alicujus*.

New Laws are to be ordained for these purposes onely, that is, either for making and erecting of new necessary defences, or for the overthrowing of some unnecessary Lets and Annoyances, or for the continuance of the ancient.

And in alteration, new addition, or diminution of a Wall, Bank, Sewer, Goat, Calcey or other Engine, a new Law is to be made for the effecting thereof.

Also if an ancient Wall, Bank or other Defence be worn out of use, and is altogether unnecessary, but in the Wisdom and Discretion of the Commissioners, and that a new one in another place were more convenient for the safety of the countrey; this must be all done by a new Law.

But here a matter of Law will arise, and another matter of great caution: The matter of Law will rest in this, Whether an ancient Wall, Bank or other Defence which is grown out of use, may be overthrown and pulled down; and in my opinion it may, by the said third clause of the Statute, wherein power is given either to maintain them or to put them down.

But because I have formerly handled this point, I will therefore proceed to the caution, which is of great weight and importance; for whereas one or moe persons are by Tenure, Covenant, Custom, Prescription or otherwise bound and tied to repair and maintain the said ancient Bank, Wall, Sewer, or other Defence at their several and peculiar charges; if then the Commissioners of Sewers should make a Law to overthrow or remove the same, and should execute the same accordingly; and then should make a Law to erect and build a new Wall, Bank or other defence in another place more convenient, yet the parties which were bound to maintain & repair the former old Defences, should not so be

tied

tied and bound to repair and maintain these new erected ones, because by the destroying of the ancient Walls and Banks, the Prescriptions, Customs, Tenures and Covenants were either utterly dissolved, or otherwise suspended; & the charge for the erecting & maintaining of the new ones are to be laid on the Level: So that it behoveth Commissioners to be careful in these affairs, else things in the conclusion may fall out contrary to their expectations; for it is well said, That *Rerum progressus ostendunt multa quæ in initio nec præcaveri aut prævideri possunt.*

In making new Laws and Ordinanes these things are also considerable;

First, what the matter of the Law is which is to be Enacted. 1.

Secondly, when the matter is known, then to weigh it well, whether if it be made, if then it will prove necessary and behooffull for the good of the people; and this necessary point is to be scanned by the counsel and advise of the most discreet and experienced persons, and of the best tryed judgements in matters of this nature. 2.

And thirdly, to consider what charge the work will cost, for the which this Law must be made; for in Scriptures he is not counted sapient that before he build a house will not first count the charge of it. 3.

And fourthly, what persons must bear this charge, least it prove too burthensome; and this must be directed by the ability of the people which are to be charged, and by the the safety and commodity they are to have by the work. 4.

I observe also that this Statute useth three words, which are all powerful in signification and operation, *videlicet*, *Laws*, *Ordinances* and *Decrees*; and I think it fitting for me, so near as I can, both to deliver the definitions of them, and the differences between them.

A Law.

A Law.

A Law is properly a matter which hath taken his essence and power by a Custom time out of memory, as the Common Laws have done; Or else is a matter Acted and Enacted in Parliament by the King and the great Counsel of the Realm, and by the Authority thereof, for the ordering of mens Bodies, Lands and Goods; and such a Law is hereby intended, because the Laws which the Commissioners shall make have the power of an Act of Parliament to strengthen and assist them, and they are to receive life and perfection from this Statute I read on.

Ordinance.

AN Ordinance is a word having a more private and less powerful signification then the word *Law* hath; for it is a Law but of a secundary power, enacted by a Corporation, Company or Commission, proceeding meerly out of the Power and Prerogative of the King by Charter, Grant or Commission warranting the same, as those Corporations, Societies and Companies which have power by Charters or Patents to make the same; as is set forth in the cases of the City of *London*, and of the Chamberlain of *Londons* Case in Sir *Edward Cooks* Reports.

Also Ordinances may be made by the power of a Court, as in a Court Baron to make Orders, or by the Inhabitants of a Town by Custom, for the ordering of their Commons, Repairing of their Churches and Highways: And these are more properly by-Laws then Laws; for a Law is either the Common Law, Customary Law, or an Act of Parliament; all which are of greater force then any Laws made by these secundary means, which of themselves are of little or no strength but as they are assisted by other primary powers.

Decree.

Decree.

A Decree is neither a Law nor Ordinance in proper definition, but is only a Sentence or Judgement in a Court of Juſtice, delivered or declared by the Judges there, by and through the power & ſtrength of a general former Law, for *Decretum eſt Sententia lata ſuper Legem.*

So that a Law is a general direction for a multitude.

An Ordinance is a ſubordinate direction, proceeding out of a more general power.

And a Decree is a Sentence delivered for or againſt a particular perſon, grounded upon the ſaid Laws and Ordinances.

Continuance of Laws.

IT comes now fitly for me in turn and courſe to declare the continuance of theſe Laws, Ordinances and Decrees; for it is to be obſerved, that ſome of them be but temporary, though others perpetual.

The words in our Statute are, *That every Statute and Ordinance made before the Statute of* 23 H. 8. *concerning the things and matters therein mentioned, as well in the time of* H. 8. *as of any of his Progenitors, not being contrary to this Statute, or heretofore repealed, ſhall ſtand in force for ever, and are commanded to be put in due Execution:* But this clauſe is intended of all Acts of Parliament made touching the Sewers, and be not intended or meant of Laws and Ordinances made by the Commiſſioners of Sewers themſelves.

Laws and Decrees made for ſale of Lands by the Powers and Authorities of this Statute, are to be made and ingroſſed into Parchment, and certified under the Seals of the Commiſſioners into the Chancery, and the Kings Royal aſſent had thereto, under the Privy Seal, ſhall alſo ſtand good and effectual.

And all Laws and Ordinances written in parchment, and indented,

indented, and under the Seals of the Commissioners, whereof the one part shall remain with the Clerk of the Sewers, and the other part to remain in such places as the Commissioners should appoint (notwithstanding the same be not certified into the Chancery, nor the Kings Royal assent be had thereto) shall continue in force till the same shall be altered, repealed or made void by another Commission of Sewers, although the former Commission by the which these Laws were made were determined by Superfedeas.

13 Eliz. cap. 9.

The Commission is to continue for ten years from the date thereof by force of the Statute of 13 *Eliz.* yet notwithstanding all Laws and Ordinances which are written in parchment, indented and sealed by the Commissioners of Sewers, without certifying into the Chancery, or the Kings Royal assent had thereto, shall notwithstanding the determination of the Commission by the expiration of the said ten years, continue in force for one whole year next insuing, to be put in execution for that time by six Justices of the Peace, whereof two to be of the *Quorum*, but then the power of the Justices of the Peace is ceased by the coming of a new Commission of Sewers.

13 El.

All other Laws and Ordinnces of Sewers which are but made and writ in paper, or which be but in parchment, and not Indented, or which be indented also, if not sealed, continue in force no longer then that Commission continueth by the power whereof they were made.

And so by this short declaration I have made, the Commissioners may the better observe how long time Laws and Ordinances of Sewers are to continue in force; yet though they lose their vigor they may notwithstanding be revived by the power of a new Commission, or remain for presidents for after ages to imitate.

Re-

Repealing of Laws.

IN this last place I intend to deliver my opinion, what Laws, Ordinances and Decrees may be repealed, altered or made void by the Commissioners of Sewers.

Therefore it is first to be considered, what grounds are to be observed in repealing or altering former Laws.

It appears in Esther, that the Laws of the *Medes* and *Persians* were so perdurable, as they could never be changed: And in my opinion there is required as great foresight, judgement, and as sound discretion and mature deliberation in repealing of old Laws, as in making new ones; For *Quæ præter consuetudinem & morem majorum fiunt neq; placent neq; recta videntur.*

I have noted how carefully and constant the Lords of the Parliament House were in the 20 year of *H.* 3. when they all cried out aloud *Nolumus leges Angliæ mutare.*

Seeing therefore there ought to be great care in making Laws, so must there be great heed taken in repealing of Laws.

And because Commissioners of Sewers have power herein, I will therefore deliver my opinion how far that power will extend: And if one note this Branch of the Statute well; he shall well perceive the Judicious care taken by the Parliament in penning of it; For the words be, *That the Commissioners of Sewers should have Power and Authority to make, constitute and ordain Laws, Ordinances and Decrees, and the same Laws and Ordinances* (omitting the word Decrees) *to alter, repeal and make void*; for a Decree is a Judgement, and is *Finis operis*, and a Judgement cannot be reversed without a Writ of Error: Neither can a Sentence or a Decree in Chancery be reversed without a Bill of Review; neither can the Commissioners of Sewers reverse a Judgement or Decree of Sewers Judiciously pronounced, which is a Judgement upon a Tryal betwixt the King and the party, or betwixt party and party, without a Bill of

Reversal, for it is truly said, *Quod naturale est unum quodque dissolvi eo ligamine quo ligatum est.*

A Writ of Error lay at the Common Law for to reverse a Judgement given by Commissioners of Sewers when the Commission was in Latine, as is set forth in the Register being then one of the special Commissions of *Oyer* and *Terminer*; but since the Commission was put into the English frame, the Writs of Error ceased.

A Law for sale of Lands ingrossed into parchment, and certified into the Kings Court of Chancery, with the Kings Royal assent had thereto, is not reversable without an Act of Parliament; but then the said sale must be made according to the form, frame and power of this Statute.

For put the Case that *A. B.* holdeth his Lands of *I. S.* by the payment of Twenty shillings yearly towards the repair of such a Bridge, Bank or Wall, it fortuneth that *A. B.* paid the Twenty shillings yearly to his Lord for that purpose, who neglecteth to pay it, though he be thereto Ordered and Assessed to pay the same to the said repairs by the Commissioners of Sewers, the seigniory of Twenty shillings yearly is to be decreed, and not the Land, for that the fault was in *I. S.* and not in *A. B.* the owner of the Land.

If any persons be by Prescription, Custom, Tenure, Covenant or otherwise, bound to repair Walls, Banks or other defences of Sewers, the Commissioners have not any power by their Commission to repeal, alter or make void any of these, because these are established by the Common Law, and Customs of the Realm, and not by the power of the Commission of Sewers: But their power is to repeal, alter or make void Laws and Ordinances made by themselves, or by the power of their Commission: And so the words of their Commission plainly describe it; For thereby they have power to make Laws and Ordinances, and the same to repeal, alter and make void, so they must be the same and no other: And herein I end all my Arguments and discourse upon this Statute, for I accompt all the rest which remaineth unspoken of not to be worthy of a Rea-

readers dialect, because I have fully handled all the
materials of this worthy Law; And therefore I may justly
conclude my Argument with this, That *Finitum est hoc opus*
non finitum.

FINIS.